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Supreme Court of the United States

OCTOBER TERM, 1956

No. 94

WILLIAM RADOVICH, PETITIONER,

vs.

NATIONAL FOOTBALL LEAGUE, BERT BELL, J. RUFUS KLAWANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 18, 1956
CERTIORARI GRANTED OCTOBER 8, 1956

No. 14394

United States
Court of Appeals
for the Ninth Circuit

WILLIAM RADOVICH,

Appellant,

vs.

NATIONAL FOOTBALL LEAGUE, et al.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court for the Northern District of California

No. 28988R

WILLIAM RADOVICH,

Plaintiff,

vs.

NATIONAL FOOTBALL LEAGUE, BERT BELL, J. RUFUS KLAWANS, BOSTON YANKS, NEW YORK RANGERS, NEW YORK GIANTS CLUB, PHILADELPHIA EAGLES, THE LOS ANGELES RAMS FOOTBALL CLUB, INC., PITTSBURGH STEELERS FOOTBALL CLUB, WASHINGTON REDSKINS, CHICAGO BEARS FOOTBALL CLUB, INC., CHICAGO CARDINALS FOOTBALL CLUB, DETROIT LIONS FOOTBALL CLUB, GREEN BAY PACKERS, SAN FRANCISCO CLIPPERS, DOE ONE, DOE TWO, DOE THREE, DOE FOUR, DOE FIVE, DOE SIX, DOE SEVEN, DOE EIGHT, DOE NINE AND DOE TEN,

Defendants.

COMPLAINT

The above-named plaintiff brings this action against the above-named defendants, and for claim of relief, he complains and alleges as follows:

I.

Jurisdiction and Venue

1. This complaint is filed and these proceedings

are instituted against the above-named defendants under Sections 15 and 26 of Title 15 U.S.C.A., being a part of the Act of Congress of July 2, 1890, c.649, 26 Stat. 209, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act and the Clayton Act.

2. Each of the corporate defendants transacts business, maintains offices and may be found in San Francisco, California.

II.

Description of the Parties

3. William Radovich, a resident of the City of Los Angeles, State of California, is a professional football player. He played football for the University of Southern California up to 1937 and in 1936 and 1937 was chosen "All Coast Guard." From 1938 to 1941, he played with the Detroit Lions of the National League. He entered the Navy in July of 1942 and played with the Great Lakes Service team for the 1942 season. In that year, he was selected as one of the guards on the All Service Team. Upon his discharge from the Navy, he rejoined the Detroit Lions. At the end of the 1945 season, he was unanimously selected by Associated Press, United Press, and the International News Service as "All-Pro Guard."

4. The defendant National Football League, hereinafter referred to as National League, was

organized as the American Professional Football Association at Akron, Ohio on April 30, 1921. On June 24, 1922, its name was changed to the National Football League. On April 12, 1940, its membership fee was set at Fifty Thousand Dollars ($50,000). On January 13, 1946, the National League organized three minor leagues which it called: the American League, the Dixie League and the Pacific Coast League. The Pacific Coast League of the National League includes the Hawaiian Warriors, the Salt Lake City Seagulls, the Los Angeles Bulldogs, now known as the Long Beach Bulldogs, and the San Francisco Clippers.

5. The following defendants are members of the National League. The status, whether corporate or associate, of these members is not known to the plaintiff except where indicated in their names. Upon discovery, the plaintiff will pray leave to amend this complaint to show the exact state of incorporation or association.

a. Boston Yanks, now in New York and known as the New York Rangers, owned by Ted Collins, Statler Office Building, Boston 16, Massachusetts.

b. New York Giants Club—J. V. Mara, President, 11 West 42nd Street, New York City.

c. Philadelphia Eagles—Alexis Thompson, President, 22 South 17th Street, Philadelphia, Pennsylvania.

d. The Los Angeles Rams Football Club, Inc.—

Daniel V. Reaves, President, 273 South Beverly Drive, Beverly Hills, California.

e. Pittsburgh Steelers Football Club—Arthur Rooney, President, 521 Grant Street, Pittsburgh 39, Pennsylvania.

f. Washington Redskins—George Marshall, President, 739 Ninth Street, N.W., Washington 1, D. C.

g. Chicago Bears Football Club, Inc.—George S. Halas, President, 233 West Madison, Chicago 6, Illinois.

h. Chicago Cardinals Football Club—Ray Benningsen, President, 511 Plymouth Court, Chicago 5, Illinois.

i. Detroit Lions Football Club—D. Lyle Fife, President, 505 Park Avenue, Tuller Oil Building, Detroit 26, Michigan.

j. Green Bay Packers—Earl L. Lambeau, General Manager, City Stadium, Green Bay, Wisconsin.

6. The defendant Bert Bell is and has been for sometime past the Commissioner of the National League.

7. J. Rufus Klawans, a resident of the above district and division, is and for sometime past has been Commissioner of the Pacific Coast League of the National League.

8. The true names or capacities, whether corporate, associate or otherwise, of defendants Doe

One through Doe Ten are unknown to plaintiff and plaintiff therefore designates them by such fictitious names, and when their true names are discovered, this complaint will be amended accordingly.

9. Whenever it is hereinafter alleged in this complaint that any defendant corporation or association did any act or thing, such allegation shall be deemed to mean that the officers, agents, and employees of the said defendant authorized, ordered or did such act or thing for and on behalf of said defendant corporation while actively engaged in the management, direction, control and operation of the business affairs of said corporation.

III.

Nature of the Trade and Commerce Involved

10. The exhibition of professional football contests is directly tied in and connected with lucrative contracts for the interstate communication by radio and television of the playing of the games. The interstate communication by radio and television is not incidental to the exhibition of the game because the substantial remuneration involved in the said interstate communication is a significant portion of the gross receipts resulting from the exhibition of football contests. Football games are played on the basis of round robin schedules in Boston, New York, Washington, Philadelphia, Los Angeles, Pittsburgh, Chicago, Detroit, Green Bay and other metropolitan centers throughout the United States. During the football season, there is constant travel

by the ball players and managers between these cities. Prior to the opening of the season, the managing agents of the various teams make contracts with broadcasting and televising companies under the terms of which these companies agree to send across state lines play-by-play narratives or moving pictures of the games. They enter into contracts with the said companies by which for large payments they allow the companies to install suitable apparatus in the ball parks by means of which the companies transmit the narratives and pictures to the outside public. At the time of contracting, it is specifically agreed, understood and contemplated that the transmission of the narratives and pictures by broadcasting and television companies will include interstate communication.

11. The contracts with the broadcasting and television companies are mutual arrangements by which each club contributes its share to a common venture. The arrangements between the defendants and the broadcasting and television companies are not mere incidents of the business but are part of the business of professional football itself. Without the substantial sums of money derived by the defendants from the broadcasting, televising and the photographing of the games, the business of operating a professional football club would not be profitable. The playing of the games is essential to the interstate transmission by broadcasting and television. The contract hereinafter described between the football players and the defendants, including the so-

called "reserve clause" relate not only to the local exhibition of football games but necessarily as well to the interstate broadcasting and televising thereof.

IV.

The Combination and Conspiracy

12. Beginning in or about the year 1938 and continuing without interruption thereafter up to and including the date of filing of this complaint, the defendants and others acting in concert with them have violated and are now violating Sections 1 and 2 of the Sherman Act by unlawfully contracting, combining and conspiring to monopolize, monopolizing and attempting to monopolize, and by unlawfully contracting, combining and conspiring to restrain trade and commerce among the several states in the business of professional football and by conspiring to monopolize, control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States.

13. The said unlawful conspiracy to monopolize, monopoly and attempt to monopolize, the contracts, combinations and conspiracies to restrain trade and commerce in the business of organized professional football have consisted and do consist of a continuing agreement and concert of action among the defendants, the substantial terms of which agreement and the means of such concert of action are as follows:

a. That defendants agree that in making contracts with football players, each will use the uniform players' contract published by the National League:

b. That defendants agree to insert in said uniform players' contract a reserve clause under the terms of which the football player binds himself not to sign a contract with or play for any club other than the club which originally employed him or its assignee. In effect this clause prevents a player from ever playing for any team other than his original employer unless the employer consents.

c. That defendants agree that any player violating the reserve clause will be blacklisted by all clubs in the National League so that no club in the said National League may hire him.

14. To effectuate the aforesaid combination and conspiracy, and as a part thereof, the defendants throughout the period from 1938 to the date of the filing of this complaint, regularly and continuously did the things which they agreed to do, as aforesaid, and more specifically, among others, did the following things:

V.

The Boycotting and Blacklisting of Plaintiff

15. The plaintiff was All Coast Guard in 1936 and 1937 during which years he played on the varsity on the University of Southern California. In 1938 he joined the Detroit Lions. He played

with the Detroit Lions for the seasons of 1938, 1939, 1940 and 1941.

16. In July of 1942, plaintiff joined the Navy. For the 1942 season, he played with the Great Lakes Service team and was selected as guard on the All Service Team for that year.

17. In 1943, plaintiff did not play football but was Athletic Instructor, Chief Specialist of Athletics at the University of California at Los Aangeles. He remained at U.C.L.A. from June, 1943, to March, 1945, when he transferred to the University of New Mexico as Line Coach.

18. Plaintiff was at Corona Naval Hospital in June, 1945, and was honorably discharged from the Navy in September, 1945, after thirty-eight months of service.

19. Upon his discharge from the Navy, the defendant Detroit Lions immediately arranged for his transportation to Detroit whereon the following season he played in the first game of the 1945 season, and throughout that season he averaged fifty-eight minutes of every game for the entire eleven-game series. At the end of the season he was selected unanimously by the Associated Press, the United Press, and International News Service as All-Pro Guard.

20. During all of period of time in which the plaintiff was with the Detroit Lions, he was forced, as all professional football players are forced, to

sign the uniform contract containing the reserve clause.

21. On Christmas Eve, 1945, Don Ameche, then president of the Los Angeles Dons, telephoned the plaintiff and inquired whether plaintiff was interested in playing for the Los Angeles Dons. Plaintiff answered in the affirmative and thereafter negotiated a contract with the Los Angeles Dons with Edward "Slip" Madigan. The contract was negotiated in January, 1946, for a two-year period at a salary of Six Thousand Five Hundred Dollars ($6,500) for each year.

22. The Detroit Lions paid plaintiff only Three Thousand Two Hundred Fifty Dollars ($3,250) under the 1945 contract. During the 1945 season, plaintiff was informed by Fred Mandel, then owner of the Detroit Lions, that he would receive a bonus for playing time per game which should have been Five Hundred Dollars ($500) over the contract. It was in the 1945 season that he was unanimously chosen on the All-Pro Team. It is customary for a player receiving such an honor to receive a further bonus from his club. The Chicago Bears has paid their All-Pro members a One Thousand Dollar ($1,000) bonus. Fred Mandel promised plaintiff that he would be given a substantial bonus, but he received from Lewis Cromwell, the manager, only Four Hundred Dollars ($400) for both of the aforementioned earned bonuses.

23. Before signing with the Los Angeles Dons, plaintiff had asked Mandel of Detroit Lions to be

traded to the Los Angeles Rams, a member of the National League, when the said Rams transferred to Los Angeles from Cleveland, but Mandel, relying on the uniform contract of the National League, refused to do so. At the time plaintiff told Mandel that he desired to be transferred to Los Angeles, within the framework of the National League contract, because his father had been stricken with a dangerous affliction and had been operated on at St. Joseph's Hospital on July 12, 1945, and it was necessary for plaintiff to remain close by for the purpose of aiding and assisting his father. Mandel continued to refuse to transfer plaintiff to Los Angeles relying on the coercion of the blacklisting, boycotting and banning of plaintiff from the business of organized football.

24. In early September of 1946, Mandel of Detroit Lions came to California and after plaintiff's first game with the Los Angeles Dons against the Miami Seahawks, Mandel told plaintiff that he had breached his contract with the Detroit Lions and must return. Plaintiff again asked Mr. Mandel to be traded to the Los Angeles Rams so he could stay in Los Angeles because of his father's health, who had been operated upon a second time on August 31, 1946, at the Queen of the Angeles Hospital in Los Angeles. However, fearing the consequences of a ban and still cognizant of the necessity of earning more money so that Plaintiff could care for his father and family, Plaintiff offered to go back to play for the Detroit Lions if they would give him

the same amount of money as he was receiving from the Los Angeles Dons, namely Six Thousand Five Hundred Dollars ($6,500) a year. Mandel refused to meet this offer and instead gave plaintiff an ultimatum that he return to Detroit for the first League game or suffer the penalties, boycotts and blacklisting imposed by the National League. Plaintiff refused to be bullied by Mandel and played with the Los Angeles Dons for the 1946 season.

25. The Los Angeles Dons was not a team of the National League but a team of the then organized All America Conference. The All America Conference was a rival to the National League, and part of the combination, conspiracy and monopoly heretofore alleged has consisted of agreements by the defendants to boycott and, if possible, ruin the All America Conference so that the business of organized football would remain the monopoly of the National League.

26. Plaintiff played the 1946 season with the Dons and at the end of the season was selected as All-Pro Guard by Associated Press.

27. In 1947, plaintiff played all season with the Los Angeles Dons, the contract terminating in April of 1948. He received honorable mention for All-Pro Team but had sustained an injury which prevented his playing full time.

28. At the start of the 1948 season, plaintiff was contacted by William Howard, coach of the San Francisco Clippers of the National League. Mr.

Howard desired to employ plaintiff as a combination coach and player at a salary of Five Thousand Dollars ($5,000) per year. He told plaintiff that he was so employed. The defendants, in the meantime, had caused blacklists to be published throughout the country directly notifying all the members of the National League, including the members of the Pacific Coast Division, that severe penalties would be imposed against any team hiring or employing plaintiff. In the San Francisco area, the blacklisting was accomplished through the defendant J. Rufus Klawans. Mr. Howard was informed by his superiors that while the San Francisco Clippers desired to employ plaintiff, the club would be unable to do so so long as the blacklisting by the National League was in effect. Accordingly, Howard informed plaintiff that because of the National League ban and boycott and blacklisting, he would not be able to employ him at Five Thousand Dollars ($5,000) a year as agreed.

29. Plaintiff has made repeated requests to defendant Bert Bell to remove the ban, boycott and blacklisting imposed against plaintiff for signing with the Los Angeles Dons of the All America Conference in 1946. The defendant Bert Bell has steadfastly refused to do so.

30. The said boycott, ban and blacklisting remains in effect as of the present time.

VI.

Effect of the Combination, Conspiracy and Monopoly in Restraint of Trade

31. By reason of the aforesaid violations of the anti-trust laws, defendants have injured the business of plaintiff by actively eliminating him from the business of organized football; they have suppressed competition and have monopolized the business of organized football; they have eliminated competition among themselves and prevented new competition; they have sought to impair the competition of the All America Conference; they have effectively placed all football players within their control in a condition of bondage through use of the uniform contract of the National League.

32. The injury to plaintiff was directly intended by defendants and was caused by the monopolistic practices herein alleged, and the said injury resulted in the damaging of plaintiff in the sum of Thirty-five Thousand Dollars ($35,000).

Wherefore, plaintiff prays judgment as follows:

1. That summons issue to each of the defendants commanding it to answer the allegations contained in this complaint and to abide by and perform such orders and decrees as the Court may make in the premises.

2. That plaintiff receive with interest as damages for the injury to his business the sum of Thirty-five Thousand Dollars ($35,000), and that

the said sum be trebled to One Hundred Five Thousand Dollars ($105,000), and that the Court award a reasonable attorneys' fees, all in accordance with Section 4 of the Clayton Act (15 U.S.C.A. 15) in such cases made and provided.

3. That the aforesaid combination and conspiracy, contract, agreements, arrangements and understandings in restraint of interstate commerce, conspiracy to monopolize, attempts to monopolize and monopolization of interstate commerce be adjudged and decreed to be unlawful, and that the contracts, agreements, arrangements, understandings and practices alleged in this complaint be adjudged and decreed to be in violation of Sections 1 and 2 of the Sherman Act.

4. That the Court adjudge and decree that the defendants have combined and conspired to restrain unreasonably and have conspired to monopolize, attempted to monopolize and have monopolized the interstate trade and commerce in the business of organized football in violation of Sections 1 and 2 of the Sherman Act.

5. That the Court enjoin defendants from the further performance of contracts containing the so-called "reserve clause."

6. That the Court enjoin defendants from boycotting or blacklisting plaintiff.

7. That the Court issue a preliminary injunction compelling defendants to remove plaintiff from their blacklists.

8. That plaintiff recover his costs herein.

9. That plaintiff have such other and further relief as the Court may deem proper.

/s/ JOSEPH L. ALIOTO,

/s/ ELWOOD S. KENDRICK,

/s/ JOSEPH F. MURPHY.

[Endorsed]: Filed July 5, 1949.

[Title of District Court and Cause.]

ANSWER

The defendant National Football League, reserving all of the rights urged in its motion to quash service of process and in its motion to dismiss, and the defendants, Chicago Cardinals Football Club, Inc., New York Football Giants Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club, answer the complaint of plaintiff on file herein and admit, deny and allege as follows:

1.

Answering paragraph 1 defendants and each of them deny that they or any of them have committed any acts prohibited by the Sherman Act or the Clayton Act or violated any provisions of the said acts.

2.

Answering paragraph 2 defendants and each of them deny that they or any of them transact business or maintain an office or offices or may be found in San Francisco, California, or within the jurisdictional limits of this Court.

3.

Answering paragraph 3 defendants and each of them admit that plaintiff played football with a professional football team owned by Fred L. Mandel, Jr., individually and doing business as Detroit Lions (hereinafter in this answer referred to as the Old Detroit Lions); that said Old Detroit Lions was a member of the National Football League and the plaintiff played football for said member during the seasons of 1938, 1939, 1940, 1941 and 1945; that said Fred L. Mandel, Jr., sold his franchise in the defendant National Football League to the Detroit Football Company on January 15, 1948; that at said time said defendant Detroit Football Company acquired the right to the use of the name Detroit Lions and said defendant Detroit Football Company now is a member of the defendant National Football League and is known as the Detroit Lions; that at the time said defendant Detroit Football Company acquired said franchise the plaintiff had already been suspended by the defendant National Football League, all as more particularly set out in this answer. Except as to the matter so admitted defendants and each of them are without knowledge

or information sufficient to form a belief as to the truth of the averments of paragraph 3 and basing their denial upon such ground defendants and each of them deny generally and specifically the averments not hereinabove admitted.

4.

Answering paragraph 4 defendants and each of them allege that National Football League is an unincorporated association which was organized as the American Professional Football Association at Akron, Ohio, during or about the year 1920, the exact date being unknown; that during or about the year 1922, the exact date being unknown, the name thereof was changed to National Football League; that upon application for admission to membership a prospective member is required to deposit with the league the sum of Twenty-five Thousand Dollars ($25,000) and an additional sum of like amount upon approval of the application. Defendants and each of them deny that the National Football League organized the American League, Dixie League or Pacific Coast League, or any other league or leagues either on January 13, 1946, or at any other time, or at all; defendants and each of them have no knowledge or information about or on the identity or names of the members of the Pacific Coast League and basing their denial upon that ground deny that the teams named in paragraph 4 of plaintiff's complaint were members of the Pacific Coast League. Except as herein admitted defendants and each of them deny each and every,

all and singular, the allegations of paragraph 4 of plaintiff's complaint.

5.

Answering the allegations of paragraph 5 defendants and each of them aver that the members of the National Football League at the time of the filing of the complaint were as follows:

(a) Boston Yanks—A business owned and operated by Ted Collins individually and doing business as Boston Yanks with its principal office for the transaction of business in the Statler Building, Boston, Mass.

(b) New York Football Giants Club, Inc.—A business corporation organized and existing under the laws of the State of New York with its principal office for the transaction of business located at 11 West 42nd Street, New York City, New York.

(c) The Philadelphia Eagles, Inc.—A business corporation organized and existing under the laws of the State of New York with its principal office for the transaction of business located at 22 S. 17th Street, Philadelphia, Pa.

(d) Los Angeles Rams Football Club—A limited partnership consisting of and owned and operated by Messrs. Daniel F. Reeves, Edwin Pauley, Al Pauley, Fred Levy, Jr., and J. H. Seley, with the principal office of said limited partnership at 7813 Beverly Blvd., Beverly Hills, California.

(e) Pittsburgh Steelers Sports, Inc.—A business corporation organized and existing under the laws

of the State of Pennsylvania with its principal office for the transaction of business at 521 Grant Street, Pittsburgh, Pennsylvania.

(f) Washington Redskins Pro Football, Inc.—A busjness corporation organized and existing under the laws of the State of Maryland with its principal office for the transaction of business located at 739 Ninth Street, N.W., Washington, District of Columbia.

(g) Chicago Bears Football Club, Inc.—A business corporation organized and existing under the laws of the State of Illinois with its principal office for the transaction of business located at 233 West Madison, Chicago, Illinois.

(h) Chicago Cardinals Football Club, Inc.—A business corporation organized and existing under the laws of the State of Illinois with its principal office for the transaction of business located at 511 Plymouth Court, Chicago, Illinois.

(i) Detroit Football Company—A business corporation organized and existing under the laws of the State of Michigan with its principal office for the transaction of business located at 505 Park Avenue, Tuller Oil Building, Detroit, Michigan.

(j) Green Bay Packers, Inc.—A business corporation organized and existing under the laws of the State of Wisconsin with its principal office for the transaction of business located at 349 S. Washington Street, Green Bay, Wisconsin.

That the present membership of the defendant National Football League is the same as it was at the time of the filing of the complaint in this action except as follows:

(a) The Boston Yanks have changed their name to New York Yanks; said team is still owned by Ted Collins individually and now does business as New York Yanks in New York with its principal office for the transaction of business at 4 W. 62nd Street, New York City, N. Y.

(b) Cleveland Browns Football Club—A business corporation organized and existing under the laws of the State of Ohio with its principal office for the transaction of business located in the Leader Building, Cleveland, Ohio.

(c) San Francisco 49ers—A limited partnership consisting of Anthony J. Morabito and Victor P. Morabito doing business as San Francisco 49ers with its principal office for the transaction of business in the Phelan Building, San Francisco, California.

Except as herein averred defendants and each of them deny generally and specifically the allegations of paragraph 5.

6.

Answering paragraph 6 defendants and each of them admit the allegations therein set forth.

7.

Answering paragraph 7 defendants and each of them aver that they and each of them are informed

and believe that the allegations therein set forth are true.

8.

Answering paragraph 8 defendants and each of them aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

9.

Answering paragraph 9 defendants and each of them deny generally and specifically all of the allegations of said paragraph other than allegations indicating the intention of the pleader.

10.

Answering paragraph 10 defendants and each of them aver that each of the members of the defendant National Football League leases a football stadium within the city which it represents and that in said stadium its team performs and engages the teams of the other clubs of its league in regularly scheduled league games for which admission is charged; that some of said games are played for profit and others are played at a loss; that rights to broadcast descriptions of some football games have been granted by some members of the National Football League clubs to other persons and that some broadcasts and some telecasts of descriptions of football games are transmitted across state lines; that broadcasts and telecasts of descriptions of football games, and the granting of the rights to broad-

cast and telecast such descriptions are merely incidental to the playing of the game in the local stadium of the member and are in no way necessary for, or a part of the playing or holding of football games or contests; that rights to broadcast or telecast descriptions of football games are sometimes purchased by corporations which are engaged in interstate commerce, and that the contracts under which such corporation purchases such rights usually provide for the right to broadcast or telecast some or all of the regularly scheduled league games of the member clubs when and if played.

The defendants and each of them further aver that the revenue derived by the member clubs in the league for the right to broadcast or telecast the game is not substantial and is relatively small compared to the receipts derived from the patrons attending the game itself.

Defendants and each of them aver that the playing season of the National Football League extends from about the middle of July to the middle of December with a prearranged schedule whereby each member team is scheduled to play approximately five games at home and five games at the home grounds of five of the other league members; that in addition member teams are permitted to and actually do engage in the playing of exhibition games during the training season which extends from approximately the middle of July to the beginning of October; that during October, November and a part of December the regular league play is

conducted; that in playing the schedule for each season each member club, when playing as a visting club, transports at its own expense its playing equipment and player personnel across state lines to such an extent and at such times as are necessary to enable it to reach the place at which the scheduled games are played. Except as herein admitted defendants and each of them deny generally and specifically the allegations of paragraph 10.

11.

Answering paragraph 11, defendants and each of them restate each and all of the allegations contained in paragraph 10 of this answer as fully and with the same force and effect as if herein restated at length. Defendants and each of them deny that without the income from contracts permitting radio broadcasts, telecasts and photographs of the games, a professional football team could not operate profitably, and in this connection allege that many defendant teams did operate profitably for many years without any radio, television or photography whatsoever; that the income from said sources is a mere incident to the main operation of the defendant clubs—namely the playing of the game itself before actual spectators and at parks and stadiums provided for that purpose; that the playing of said game is purely a local affair and depends for the most part on the support and following of the members of the public residing in the community in which the stadiums are located and in the city

which the individual team in that community represents or purports to represent. The business of each of the defendants, except defendant National Football League, is giving exhibitions of major league professional football; all contests and exhibitions of football are held either wholly within the stadium owned or leased by the individual defendant member situate in the state in which it has its principal office for the transaction of business, or wholly within the stadium of the opposing member; said stadiums and each of them in which these defendants and each of them have engaged at all times herein mentioned in exhibitions of professional football are wholly within the physical limits of the state in which the respective stadium is situate, and each exhibition of professional football is played within the same stadium in which it is begun; the presentation of exhibitions of professional football of the character in which the defendant member teams have engaged at all times herein mentioned requires that each player engaged therein, maintain and exhibit a high standard of physical fitness and have and maintain a highly specialized knowledge and skill in playing professional football; the employment of all players is determined by their special knowledge, skill and ability as football players and by their physical condition.

The defendant National Football League is an unincorporated association consisting of the member teams described in paragraph 5 of this answer; it

is presided over by one Bert Bell as Commissioner of said National Football League and said defendant National Football League, through said Bert Bell as Commissioner, conducts the business of the National Football League in its day-to-day operation; that the principal office for the transaction of business of said defendant National Football League is located at 1518 Walnut Street, Philadelphia, Pennsylvania.

Except as herein asserted, defendants and each of them deny each and every, all and singular the allegations of paragraph 11.

12.

Defendants and each of them deny that they or any of them have at any time committed any acts forbidden by Sections 1 and 2 of the Sherman Act; deny further that they or any of them have at any time violated any of the aforesaid sections of the Sherman Act, and deny that any act of these defendants has at any time damaged plaintiff.

13.

Answering paragraph 13, defendants and each of them allege that professional football in the National Football League is played pursuant to agreements and rules adopted by the member clubs from time to time to regulate and conduct an orderly and competitive exhibition of professional football among its members; that one of the rules adopted by the defendant National Football League is that

each player sign a uniform players' contract prepared and adopted by the defendant National Football League; that defendants and each of them admit and aver that all agreements, players' contracts and rules made for the conduct of professional football have resulted from thirty years of practical experience in professional football and are responsible for the successful development of the present high standards of honesty and integrity and the public confidence which has made American football a great national sport; and that the agreements, player contracts and rules made for the conduct of professional football are designed and are intended, and are effective to promote and maintain the highest degree of competition between teams, to promote the development of skilled players and to afford to them increased opportunities to advance in their profession and in their earning power, to preserve the honesty and integ ity of the game, and to maintain confidence in the game of football on the part of the public and all those participating in professional football. The defendants further aver that said agreements, player contracts and rules are necessary, reasonable and effective for the accomplishment of the foregoing objectives and that their use furthers both the public interest and that of the players and of all others employed or participating in professional football.

Defendants and each of them further admit that professional football as played in the National Football League does not consist of an isolated profes-

sional football team playing haphazardly with other teams; that the competition between member teams is conducted pursuant to prearranged schedules which are not round-robin in nature; that such schedules provide for team competition in which the public is interested; that being a team game, football must have rules and regulations as to how and when the game shall be played and who shall play it; that the defendant National Football League at all times herein mentioned did have rules and regulations covering the rights and obligations of the members and the players of the members; that one of the rules in effect in the National Football League since 1946 provided in effect that if any player violates his contract with a member team he is automatically suspended for five (5) years; that these defendants admit that in 1946 after Radovich signed a contract with the Los Angeles Dons, as aforesaid, he was automatically suspended by the defendant National Football League pursuant to its rules for a period of five (5) years; that such suspension was in effect at all times up to the date of the filing of the complaint in this action; that in that connection defendants and each of them allege that the playing of team games in accordance with a prearranged schedule and under rules defining the eligibility of the players under certain circumstances, is the common and general practice in the conduct of team sports, both amateur and professional and is necessary to provide fair and reasonable competition and to attract and maintain public interest in the sports; that, in order to attract suffi-

cient public patronage to make possible the playing of the game and to meet the just expectations of the public, football games must be played as part of regular schedules between independently-owned clubs which provide and maintain adequate physical plants and teams with adequate personnel so that the relative skills of the competing teams shall not be so disproportionate as to destroy the competitive character of the games; that it is in the interest of each club, its players and the public that each club shall have sufficient opportunity to provide and maintain a team with sufficient skill to make contests with competing clubs truly competitive; that, among other things, each club has a manager, coaches, trainer and publicity man for its players and, in so doing, devotes time, money and effort to increasing the skill, reputation and customer drawing power of the players and to protecting their health and welfare, with great benefit to the players and the public; that that it is of the highest importance to the club, the players and the public that the game shall be played under such conditions and regulations that the game's competitive character and the integrity of the game and of football as a whole shall be beyond question in the minds of the public. Except as so admitted, each and every averment of paragraph 13 of the complaint is denied.

14.

Answering paragraph 14 defendants and each of them deny generally and specifically the allegations therein contained.

15.

Answering paragraph 15 defendants and each of them admit that plaintiff played with the "Old Detroit Lions" for the seasons of 1938, 1939, 1940 and 1941 and aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph and basing their denial upon such lack of information deny generally and specifically the allegations not admitted.

16.

Answering paragraph 16 defendants and each of them aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and basing their denial upon such lack of information deny generally and specifically the allegations of said paragraph.

17.

Answering paragraph 17 defendants and each of them aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and basing their denial upon such lack of information deny generally and specifically the allegations of said paragraph.

18.

Answering paragraph 18 defendants and each of them aver that they and each of them are without

knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and basing their denial upon such lack of information deny generally and specifically the allegations of said paragraph.

19.

Answering paragraph 19 defendants and each of them admit that plaintiff played for the "Old Detroit Lions" during the 1945 season, aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph and basing their denial upon such lack of information deny generally and specifically the allegations not admitted.

20.

Answering paragraph 20 defendants and each of them admit that the services of plaintiff were contracted for by the "Old Detroit Lions" upon the common form of contract containing the usual option for renewal and with these exceptions defendants and each of them deny generally and specifically the allegations of said paragraph.

21.

Answering paragraph 21 defendants and each of them deny generally and specifically the allegations therein contained.

22.

Answering paragraph 22 defendants and each of them admit that the salary provided in the contract

of plaintiff and the "Old Detroit Lions" for the 1945 season was the sum of Three Thousand Two Hundred Fifty Dollars ($3,250) and with this exception defendants and each of them aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph and basing their denial upon such lack of information defendants and each of them deny generally and specifically the allegations not admitted.

23.

Defendants and each of them aver that on or about the 20th day of September, 1945, plaintiff entered into a contract with Fred L. Mandel, Jr., an individual doing business as "Old Detroit Lions" of defendant National Football League, wherein he agreed to render services as a football player to the "Old Detroit Lions" during the 1945 season; that the contract further gave the "Old Detroit Lions" an option on plaintiff's services as a player for the following season of 1946, which option was one of the material inducements for the "Old Detroit Lions" to enter into the contract with the plaintiff; that plaintiff accepted said employment and entered upon his duties as a football player pursuant to the term of his contract; that plaintiff was so employed by the "Old Detroit Lions" and received compensation therefor pursuant to said contract until on or about January 31, 1946, when plaintiff left the employ of the "Old Detroit Lions" and

thereby breached his contract in that he then and thereafter failed and refused to continue his employment and voluntarily and without the consent or approval of the "Old Detroit Lions" or the defendant National Football League, or any officer or agent thereof, entered into a written agreement to play, and did play football in Los Angeles for the 1946 and 1947 seasons with Southern California Sports, Inc., a California corporation, doing business under the name and style of Los Angeles Dons; that said Los Angeles Dons were likewise engaged in the playing of professional football as a member of another league of professional football teams known as the All America Football Conference; that such services performed by plaintiff for the Los Angeles Dons were for a money consideration; defendants aver that pursuant to the league rules plaintiff was thereupon automatically declared ineligible by the Commissioner of the National Football League to play football for any member of the National Football League for a period of five (5) years for violating his contract with the "Old Detroit Lions" as aforesaid. Except as herein averred defendants and each of them deny generally and specifically the allegations of paragraph 23.

24.

Answering paragraph 24 defendants and each of them admit that plaintiff played with the Los Angeles Dons during the 1946 season, deny that any penalty or boycott or blacklisting was imposed by

the defendant National Football League and with these exceptions defendants and each of them aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph and basing their denial upon such lack of information defendants and each of them deny generally and specifically all of the allegations not admitted or positively denied.

25.

Answering paragraph 25 defendants and each of them admit that the Los Angeles Dons was not a team of the National Football League, but was a member of the All America Football Conference, admit that open and unrestrained competition existed in the business of professional football and with these exceptions deny generally and specifically the allegations of said paragraph.

26.

Answering paragraph 26 defendants and each of them admit that plaintiff played with the Los Angeles Dons during the 1946 season; defendants have no knowledge or information sufficient to form a belief as to the balance of the allegations of said paragraph 26 of said complaint and basing their denial thereon, deny each and all of the remaining allegations of said paragraph.

27.

Answering paragraph 27 defendants and each of them admit that plaintiff played with the Los An-

geles Dons during the 1947 season and aver that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph and basing their denial thereon, deny each and every, all and singular the remaining allegations of said paragraph 27 of said complaint.

28.

Answering paragraph 28 of said complaint defendants and each of them deny that there is any such team as the San Francisco Clippers of the National Football League; that if such a team does exist it is not now, nor has it ever been a member, affiliate, agent or representative of the defendant National Football League, nor connected with it in any manner whatsoever; defendants and each of them admit the existence in 1948 of a professional football team operating in San Francisco and Oakland primarily known as the San Francisco Clippers; that said San Francisco Clippers were members of a league operating only on the Pacific Coast and in Honolulu known as the Pacific Coast League; that such Pacific Coast League was at all times herein mentioned known by these defendants and the public generally as a minor league; that such team known as the San Francisco Clippers was not at any time a member of defendant National Football League, nor was it ever owned, controlled or directed in any manner by any member of the defendant National Football League, nor the National

Football League itself; neither was it an agent, subsidiary, representative or affiliate at any time of the defendant National Football League, nor of any of its members, owners or representatives; that the San Francisco Clippers and the Pacific Coast League, of which it was a member, operated and conducted itself as an entirely separate and distinct entity from the defendant National Football League; it had no interest therein nor any participation or connection therewith, but was completely independent and free from any relation to and with said National Football League; it had its own members, its own officer or officers, its own commissioner, its own rules and regulations, operated in different communities for the most part, its own players and coaches, its own form of contract, its own playing rules, leased its own stadia and in general was completely and wholly independent of the National Football League and its members and was not affiliated with said National Football League or its members in any manner whatsoever. That neither said Pacific Coast League, nor any of its members was at any time a division of the defendant National Football League, nor has the defendant National Football League ever had a Pacific Coast Division at any time; defendants and each of them admit that in 1948 one William Howard was the coach of the San Francisco Clippers, but defendants have no knowledge of the details thereof, nor did they or any of them have any connection, arrangement or contract with him in any manner or of any nature whatsoever.

Defendants and each of them deny that they or any of them ever caused blacklists to be published throughout the United States or otherwise notifying league members, or the Pacific Coast League, that any penalties would be exacted or imposed against any team or person hiring or employing plaintiff; defendants deny further that defendant J. Rufus Klawans assisted, aided or carried out, or in any manner established or created such a blacklist against plaintiff preventing or impeding his playing as a football player in the Pacific Coast League or otherwise; defendants have no knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the paragraph and basing their denial upon such lack of information defendants and each of them deny generally and specifically the allegations not admitted.

29.

Answering paragraph 29 defendants and each of them deny generally and specifically the allegations of said paragraph.

30.

Answering paragraph 30 defendants and each of them deny that any boycott or ban or blacklisting against plaintiff by the defendant National Football League, or any of its members is or ever was in effect.

31.

Answering the allegations of paragraph 31 defendants and each of them deny that by reason of

any of the allegations of plaintiff's complaint on file herein, or by reason of any other action, conduct, combination, conspiracy between defendants, or any of them, or by reason of any other actions or reasons whatsoever, any or all of the defendants have damaged or injured the plaintiff in any manner whatsoever, either by eliminating him from the business of organized football or otherwise; that actually when plaintiff breached his contract with the "Old Detroit Lions" in January, 1946, and signed a new contract with the Southern California Sports, Inc., doing business as Los Angeles Dons, he increased his salary from Three Thousand Two Hundred Fifty Dollars ($3,250) per year called for in his "Old Detroit Lions" contract to Six Thousand Five Hundred Dollars ($6,500) per year in the Los Angeles Dons' contract, plus a One Thousand Dollar ($1,000) bonus for signing, plus a two-year noncancellable contract; that plaintiff during the years 1946 and 1947 did receive said sums from the Los Angeles Dons for playing football, said sums representing a 100% increase in salary to plaintiff for each season above the amount for which plaintiff had contracted to play with the "Old Detroit Lions"; that plaintiff entirely ignored, and arbitrarily and capriciously breached his contract with the "Old Detroit Lions"; that said contract was signed and executed by plaintiff freely and voluntarily and plaintiff retained and enjoyed the benefits of such breach of contract during the seasons of 1946 and 1947 without hindrance, interference or complaint from the defendants or any of them;

that in the 1948 season plaintiff attempted to sign a new contract with the Los Angeles Dons, but it refused so to do because plaintiff no longer possessed the physical and mental ability sufficient to qualify him to play major league professional football; that plaintiff was rejected as unfit for play by the Los Angeles Dons, and by each other member team in the All America Football Conference; that the services of plaintiff were offered to each member of the All America Conference in 1948; that no member thereof sought his services and he was thereupon waived out of the All America Conference and made a free agent; that upon becoming a free agent plaintiff became possessed with the idea that a team of defendant National Football League might be interested in signing him as a player for 1948; that plaintiff made several efforts to interest member teams of the defendant National Football League in his services for 1948 to no avail; that at said time and continuously thereafter plaintiff no longer possessed the physical and mental ability in sufficient degree to compete as a member of a professional football team in the defendant National Football League, or in any other league of major league caliber; that plaintiff well knew such fact; that plaintiff thereupon in the summer of 1948 sought to elicit an offer from a member team in the Pacific Coast League as a professional football player; that at all times herein mentioned defendant Pacific Coast League and its member teams were of minor league caliber as compared to the defendant

National Football League and the All America Football Conference; that its players consist primarily of players either previously released by the defendant National Football League or All America Conference, or players not possessing sufficient ability to warrant a contract with any member of said major leagues; that the schedules were limited, the salaries much smaller than that of major league players, the spectator appeal much less, the revenue at the gate, or by radio or television much smaller and in most cases the players were persons who worked at other positions during the season to assist in their support and practiced football at night after work, playing their games in small communities on Sundays; all of said facts were well known to plaintiff in 1948 and at all times herein mentioned; that plaintiff knowing he no longer possessed the ability to obtain a contract with a major league team sought work as an employee of the San Francisco Clippers at a salary of approximately Fifty Dollars ($50) per game and an estimated season of approximately ten (10) games; that plaintiff was unable to obtain employment by the San Francisco Clippers at said sum or on any terms whatsoever for reasons unknown to defendants or any of them. That the failure of plaintiff to obtain employment with the San Francisco Clippers as aforesaid was not due in any manner to any action of defendants or any of them to or with each other or to or with the defendant Pacific Coast League or any of its members, employees or representatives.

That defendants and each of them are informed

and believe and relying thereon allege that plaintiff thereafter in 1948 and 1949 obtained employment as a professional football player in the Dominion of Canada and actually played therein for compensation in the 1948 and 1949 season upon terms and on conditions, the precise terms of which are unknown to defendants or any of them, but generally on a comparable basis to that being received by plaintiff during the time he played in the United States for defendant National Football League and the All America Conference; that none of these defendants at any time interfered with or sought to impede, interfere with or prevent plaintiff from so doing, but took no action in regard thereto whatsoever; that beginning after 1947 no team in the National Football League, or in the All America Conference, had any interest in signing the plaintiff as a player in either league because of the decline in his ability and his advanced age; that plaintiff was born June 24, 1915, and at the close of the 1947 football season was over thirty-two (32) years of age; all of said facts were known to the defendants and each of them, and to all of the members of the All America Conference, and in great part influenced the actions of the teams in said National Football League and the All America Conference in not seeking his services.

That except as herein admitted, defendants and each of them deny each and every, all and singular, the allegations contained in paragraph 31 of plaintiff's complaint.

32.

Answering paragraph 32 defendants and each of them deny generally and specifically the allegations of said paragraph, deny that any injury to plaintiff was intended or caused by defendants or any of them, deny that any monopolistic practice was engaged in by defendants, or any of them, and deny that plaintiff has been damaged in the said sum of Thirty-five Thousand Dollars ($35,000), or in any sum or at all.

And as and for a Second, Separate and Distinct Answer and Defense, defendants and each of them allege:

33.

That the defendant National Football League is an unincorporated association with its principal place of business in the State of Pennsylvania, and that said defendant has no office and transacts no business and cannot be found within the jurisdictional limits of this Court.

And as and for a Third, Separate and Distinct Answer and Defense, defendants and each of them allege:

34.

That Bert Bell, who is named as a defendant in this action, resides in the State of Pennsylvania and does not have any office or residence or transact any business within the jurisdictional limits of this Court. The said Bert Bell is not amenable to the

process of this Court, could not be sued upon this alleged cause of action in this District without his consent, and is an indispensable party to the maintenance of this alleged cause of action.

By Way of a Further and Affirmative Defense to plaintiff's complaint on file herein, these answering defendants allege:

That at all times herein mentioned within the period from 1946 to the date of the filing of the complaint in this action, keen, active and aggressive competition existed for plaintiff's services as a professional football player; that during said period there was operating a second major league of professional football known as the All America Conference; that said All America Conference was an unincorporated association of eight (8) professional football teams of major league caliber exhibiting and playing professional football of the same grade, class and style as the National Football League and in open, declared, unrestrained competition with the National Football League both for public acceptance, publicity, revenue, players, stadiums, radio and television terms and contracts, coaches, managers and each and every facet of professional football; that within said period said All America Conference operated teams in direct and unrestrained competition with the National Football League in New York, Chicago, Los Angeles, San Francisco, Cleveland, Buffalo, Baltimore, Brooklyn, and as predecessor to Baltimore for the year 1946, in

Miami, Florida; that each team in the All America Conference carried thirty-three (33) football players, employed coaches of national repute, engaged scouts and assistants, competed for players, and in general resorted to every conceivable device and practice to lure patrons to the games and important and skillful players to their roster; that said All America Conference and its members had no agreements or understandings with the National Football League or its members of any kind or nature relating to the plaintiff or otherwise; that the plaintiff's services were solicited and procured by the Los Angeles Dons as a member of the All America Conference at a time when plaintiff was under contract to the "Old Detroit Lions" of the defendant National Football League; that plaintiff possessed in 1946 and 1947 special and unique talent as a professional football player; that plaintiff's talent and that of other squad members was at that time a valuable property to the holder thereof; that plaintiff had given an option on said services for 1946 to the "Old Detroit Lions" for a valuable consideration, to wit, the payment in 1945 of Three Thousand Two Hundred Fifty Dollars ($3,250); that in his contract plaintiff agreed with the "Old Detroit Lions" that it would have until August 1, 1946, to exercise its option for plaintiff's services in 1946; that plaintiff repudiated said contract and breached the same wilfully and intentionally and thereupon signed a new contract with the Southern California Sports, Inc., doing business as Los Angeles Dons; that plaintiff has not at any time performed all

things required by him to be performed under his contract with "Old Detroit Lions"; that plaintiff at all times since January 1, 1946, has been and still is in default under said contract with the "Old Detroit Lions."

By Way of a Further and Separate Defense, defendant National Football League avers that plaintiff is not entitled to injunctive or any equitable relief against defendants or any of them in that plaintiff wilfully and intentionally breached his contract as aforesaid with the defendant "Old Detroit Lions" by signing a new contract with the Los Angeles Dons and thereafter refusing to perform any further services under his contract with the defendant "Old Detroit Lions"; that by such action plaintiff has been guilty of unclean hands and has acted without equity and directly in violation of equitable principles.

As a Further Separate Defense defendants and each of them allege that plaintiff is not entitled to injunctive or any other equitable relief against defendants or any of them in that plaintiff himself has not acted equitably in connection with each and all of the matters set out in his complaint in that plaintiff signed a contract to play professional football for the "Old Detroit Lions" in 1945 and gave an option to said "Old Detroit Lions" for his services in 1946 in exchange for a valuable consideration, all of which plaintiff accepted and received; that thereafter plaintiff without cause or provocation breached said contract and repudiated his

option agreement with "Old Detroit Lions," retaining the entire consideration theretofore received to the damage and injury to the "Old Detroit Lions"; that thereafter plaintiff played professional football for a competitive organization for two years and was injured while so doing rendering him unfit for further adequate services as a major league professional football player, both because of said injury and because of the fact that at the time of the breach by plaintiff he possessed only two more seasons of potential play because of his advanced age; that when plaintiff could no longer peddle his services to the All America Conference plaintiff sought employment by defendant National Football League and its members and those affiliated with defendant National Football League; that said defendant National Football League had suspended plaintiff due to his conduct, as aforesaid; that plaintiff seeks to have this court enjoin and restrain said suspension despite his failure to act and do equity in his relations with the "Old Detroit Lions" as a member of the defendant National Football League; that all equitable relief should be denied plaintiff and that plaintiff has failed to do equity in the matters related as aforesaid.

And as and for a Special Answer and Objection to the prayer of plaintiff invoking the injunctive powers of this Court defendants and each of them deny that any cause or reason now exists, if such ever did, for the relief requested and in this connection defendants and each of them aver that plain-

tiff is not now qualified to play professional football, that the Pacific Coast Football League is now disbanded and the San Francisco Clippers, the alleged prospective employer of plaintiff, is no longer in existence, and that none of these defendants are now commiting any act which directly or indirectly affects any right of plaintiff.

And as and for a Further Special Answer and Defense defendants and each of them allege that plaintiff on the 20th day of September, 1945, made and entered into a contract in writing with the "Old Detroit Lions" whereby plaintiff agreed to render services to the said club; that as part of said contract plaintiff agreed that any dispute between plaintiff and the said club arising out of said contract should be referred to the Commissioner of the National Football League and that the decision of said Commissioner would be accepted by both parties as final; that in recognition of said provision of the said contract plaintiff on April 25, 1949, addressed a letter to the Commissioner of the National Football League setting forth the matters and things complained of in complaint of plaintiff on file herein, and requesting a hearing relating to said dispute; that in response to said request the said Commissioner by letter dated April 27, 1949, advised plaintiff that he was willing to meet with plaintiff at a time and place convenient to plaintiff, but that despite such agreement of the Commissioner plaintiff failed and neglected to present himself for such hearing and failed and neglected to

make any attempt to effectuate such hearing or to refer the matter to the Commissioner for arbitration as in said contract agreed.

Wherefore, defendants and each of them demand judgment dismissing the complaint, and awarding to defendants and each of them the costs of this action.

/s/ M. E. LEAHY,

/s/ JOHN F. O'DEA,

Attorneys for Answering Defendants.

[Endorsed]: Filed April 27, 1951.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT J. RUFUS KLAWANS

The defendant, J. Rufus Klawans, answers the complaint of plaintiff on file herein and admits, denies and alleges as follows:

I.

Answering paragraph 1, this defendant denies that he has committed any acts prohibited by the Sherman Act or the Clayton Act or violated any provisions of either of said Acts.

II.

This defendant admits the allegations contained in paragraph 2, insofar as he personally is con-

cerned, but otherwise denies each and every, all and singular, the allegations therein contained.

III.

Answering paragraph 3, this defendant is without sufficient information or belief to otherwise enable him to answer said paragraph and on said ground denies each and every, all and singular, the allegations therein contained.

IV.

Answering paragraph 4, this defendant alleges that the National Football League is an unincorporated association; denies that the Pacific Coast Football League was organized by the National Football League; in this latter connection, this defendant alleges that the Pacific Coast Football League was organized as an unincorporated association and, after eleven (11) years of operation, ceased doing business on the 14th day of May, 1949. At no time during the above periods did the Pacific Coast Football League have any connection with the National Football League, except as insofar as may be hereinafter particularly set forth, but at all times was wholly separate and independently functioning organization.

That at various times during the periods above set forth, the members of the Pacific Coast Football League were as follows:

Seattle-Tacoma, Wash.,
San Francisco,
Oakland,

Richmond,
San Jose,
Salinas,
Sacramento,
Los Angeles,
Hollywood,
Honolulu, T. H.,
Salt Lake City, Utah,
San Diego,
Portland, Oregon.

Other than as hereinabove specifically denied or as hereinafter specifically admitted, this defendant alleges that he is without sufficient information or belief to otherwise enable him to answer said paragraph and on said ground denies each and every, all and singular, the allegations therein contained.

V.

This defendant alleges he is without sufficient information or belief to otherwise enable him to answer the allegations contained in paragraph 5 and, basing his denials on said ground, denies each and every, all and singular, the allegations therein contained.

VI.

This defendant admits the allegations contained in paragraphs 6 and 7 of plaintiff's complaint, except that this defendant denies that the Pacific Coast Football League was a part of, affiliated with, or in any manner a part of the National Football League.

VII.

Answering paragraphs 8 and 9, this defendant is without sufficient information or belief to otherwise enable him to answer said paragraphs and, basing his denial on said lack of information and belief, denies each and every, all and singular, the allegations therein contained.

VIII.

This defendant denies each and every, all and singular, the allegations of paragraph 10, insofar as said allegations have reference to himself personally or to the Pacific Coast Football League.

Further answering said paragraph, and insofar as any revenue derived by the member clubs in the Pacific Coast Football League is concerned, the revenue from the broadcasting and telecasting of the games was relatively small compared to the receipts derived from the patrons attending the games itself; this defendant alleges that any arrangements made for broadcasting or telecasting individual games were matters exclusively within the jurisdiction of the individual clubs and the Pacific Coast Football League did not participate in the profits thereof or the revenue therefrom.

IX.

Answering paragraph 11, this defendant denies each and every, all and singular, the allegations therein contained, except as hereinabove or hereinafter specifically admitted.

X.

This defendant denies that he has at any time committed any acts forbidden by the Sherman Act, or any sections thereof, and denies further that he has violated said Act or damaged plaintiff, either in the manner or in the amounts alleged in said complaint or in any other manner or any other amount, or at all.

XI.

Answering paragraph 13, this defendant alleges that the Pacific Coast Football League, during the period of its existence, arranged for the playing of professional football pursuant to agreements and rules adopted by its member clubs from time to time to regulate and conduct an orderly and competitive exhibition of professional football among its members; that one of the rules adopted by the Pacific Coast Football League was that each player sign a uniform player's contract prepared and adopted by the Pacific Coast Football League; this defendant alleges that said agreements, player contracts and rules so adopted by the member clubs of the Pacific Coast Football League were necessary, reasonable and effective to accomplish the objective of a professional football league and were for the benefit of the public and the players and all persons employed or participating in the said professional football league.

That the Pacific Coast Football League did have rules and regulations covering the rights and obligations of the members and players of the members

and that one of the rules in effect during the period of the existence of the Pacific Coast Football League was to the effect that, if any one player violated his contract with a member team, he was subject to automatic suspension and other disciplinary action. In this latter connection, the player so disciplined had a right of appeal from the imposition of any penalty and the Commissioner was specifically authorized under the rules and regulations of said League to remit any fine or suspend any sentence imposed upon any player.

Except as herein admitted, this defendant denies each and every, all and singular, the allegations contained in paragraph 13 of plaintiff's complaint.

XII.

This defendant denies generally and specifically the allegations contained in paragraph 14 of plaintiff's complaint.

XIII.

Answering paragraphs 15 to 27, inclusive, of plaintiff's complaint, this defendant alleges that he is without sufficient information or belief to otherwise enable him to answer said paragraphs and, basing his denials on said ground, denies each and every, all and singular, the allegations contained in said paragraphs, and each of them.

XIV.

This defendant denies each and every, all and singular, the allegations contained in paragraph 28 of plaintiff's complaint.

XV.

Answering paragraph 29 of plaintiff's complaint, this defendant alleges that he is without sufficient information or belief to otherwise enable him to answer said paragraph and, basing his denial on said ground, denies each and every, all and singular, the allegations therein contained.

XVI.

Answering paragraph 30 of plaintiff's complaint, this defendant denies that any boycott, or ban or blacklisting of plaintiff by this defendant or the Pacific Coast Football League is, or was ever in effect.

XVII.

Answering paragraph 31 this defendant denies that by reason of any of the allegations of plaintiff's complaint on file herein, or by reason of any other action, conduct, combination, conspiracy between defendants, or any of them, or by reason of any other actions or reasons whatsoever, any or all of the defendants have damaged or injured the plaintiff in any manner whatsoever, either by eliminating him from the business of organized football or otherwise; that the failure of plaintiff to obtain employment with the San Francisco Clippers was not due in any manner to any actions of defendants, or any of them, to or with each other or to or with the defendant Pacific Coast Football League or any of its members, employees or representatives.

That except as herein admitted, this defendant denies each and every, all and singular, the allegations contained in paragraph 31 of plaintiff's complaint.

XVIII.

Answering paragraph 32, this defendant denies generally and specifically the allegations of said paragraph, denies that any injury to plaintiff was intended or caused by defendants or any of them, denies that any monopolistic practice was engaged in by defendants, or any of them, and denies that plaintiff has been damaged in the said sum of $35,000.00, or in any sum or at all.

Wherefore, said defendant demands judgment dismissing the complaint and awarding to defendant the costs of this action.

/s/ J. BRUCE FRATIS,
Attorney for Said Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 26, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION TO CONTINUE TRIAL

To the Plaintiff above named and to his attorneys:

Please Take Notice that on Tuesday, January 20, 1953, at ten o'clock a.m., or as soon thereafter as counsel may be heard, defendants will move the

above-entitled court in the department of the Honorable George B. Harris, Room 276, United States Post Office Building, 7th and Mission Streets, San Francisco, California, for an order removing the above-entitled action from the trial calendar to be reset for trial immediately following the decision of the United States Supreme Court in the matter of George Earl Toolson vs. New York Yankees, Inc., et al.

This motion is based on the stipulation of counsel for the respective parties and upon the affidavit of John F. O'Dea, a copy of which is served herewith.

Dated: January 14, 1953.

/s/ MARSHALL E. LEAHY,

/s/ JOHN F. O'DEA,

Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed January 15, 1953.

[Title of District Court and Cause.]

STIPULATION FOR REMOVAL OF ACTION FROM TRIAL CALENDAR

It Is Hereby Stipulated by and between the parties, that the above-entitled action may be dropped from the pending trial calendar to be reset for trial immediately following the decision of

the United States Supreme Court in the matter of George Earl Toolson vs. New York Yankees, Inc., et al.

Dated: January 14, 1953.

JOSEPH L. ALIOTO,
ELWOOD S. KENDICK,
JOSEPH F. MURPHY,
By /s/ JOSEPH L. ALIOTO,
Attorneys for Plaintiff.

/s/ MARSHALL E. LEAHY,
/s/ JOHN F. O'DEA,
Attorneys for Defendants.

[Endorsed]: Filed January 15, 1953.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE OF TRIAL

State of California,
City and County of San Francisco—ss.

John F. O'Dea, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendant National Football League and other defendants in the above-entitled action; that the trial of the said matter is presently set for February 9, 1953,

before the Honorable District Court sitting with a jury;

That there has heretofore been decided by the Honorable District Court of the United States, Southern District of California, Central Division, the matter of George Earl Toolson vs. New York Yankees, Inc., et al., which said action is numbered 13070-BH in the files of said court; that the decision of the said Honorable District Court has been affirmed by the Honorable United States Court of Appeals for the Ninth Circuit in proceeding No. 13228, Per Curiam Opinion filed December 12, 1952; that affiant is informed and believes that the plaintiff and appellant in said action is preparing a petition for certiorari before the Honorable United States Supreme Court;

That the issues and principles of law determined in the matter of George Earl Toolson vs. New York Yankees, Inc., et al., are almost similar to those involved in the above-entitled action and that the defenses urged by the defendant New York Yankees, Inc., in the proceedings referred to have been urged by the defendants in this proceedings; that the decision of the United States Supreme Court in the matter of George Earl Toolson vs. New York Yankees, Inc., et al., will control the course of procedure and perhaps the decision in this presently-pending action.

/s/ JOHN F. O'DEA.

Subscribed and sworn to before me this 14th day of January, 1953.

[Seal] /s/ GLORIA M. HOWARD,
Notary Public, in and for the City and County of San Francisco, State of California.

My commission expires June 17, 1956.

[Endorsed]: Filed January 15, 1953.

[Title of District Court and Cause.]

ORDER REMOVING CAUSE FROM TRIAL CALENDAR

The parties hereto having so stipulated and good cause appearing therefor,

It Is Hereby Ordered that the above-entitled action may be removed from the pending trial calendar and may be reset for trial immediately following the disposition by the United States Supreme Court of the petition for certiorari in the matter of George Earl Toolson vs. New York Yankees, Inc., et al., which said matter involves issues of law raised herein.

Dated: January 20, 1953.

/s/ GEORGE B. HARRIS,
Judge of the Above-Entitled Court.

[Endorsed]: Filed January 20, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR DISMISSAL OF COMPLAINT

To the Plaintiff above named and to Joseph L. Alioto, Esq., Joseph F. Murphy, Esq., and Elwood S. Kendrick, Esq., his attorneys:

You Will Please Take Notice that the defendants, National Football League, Chicago Cardinals Football Club, Inc., New York Giants Football Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club on the 19th day of April, 1954, at the hour of 9:30 o'clock a.m., in the Department of the Honorable George B. Harris in the courtroom of the above-entitled court, Post Office Building, Seventh and Mission Streets, San Francisco, California, will move the said court for its order dismissing the complaint on file herein.

The said motion will be made pursuant to Rule 12(b) Federal Court Rules of Civil Procedure and will be based upon the following grounds:

(1) That the complaint indicates a lack of jurisdiction in the court over the subject matter.

(2) That the complaint fails to state a claim upon which relief can be granted.

Dated: April 9th, 1954.

/s/ MARSHALL E. LEAHY,

/s/ JOHN F. O'DEA,

Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 12, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR DISMISSAL OF COMPLAINT

To the Plaintiff above named and to Joseph L. Alioto, Esq., Joseph F. Murphy, Esq., and Elwood S. Kendrick, Esq., his attorneys:

You and Each of You Will Please Take Notice that the defendants Pacific Coast Football League and J. R. Klawans, on the 19th day of April, 1954, at the hour of 9:30 o'clock a.m., in the department of the Honorable George B. Harris, in the courtroom of the above-entitled Court, Post Office Building, Seventh and Mission Streets, San Francisco, California, will move the said Court for its order dismissing the complaint on file herein.

The said motion will be made pursuant to Rule 12(b) Federal Court Rules of Civil Procedure and will be based upon the following grounds:

(1) That the complaint indicates a lack of jurisdiction in the Court over the subject matter.

(2) That the complaint fails to state a claim upon which relief can be granted.

Dated: April 12th, 1954.

/s/ J. BRUCE FRATIS,
Attorney for Defendants Pacific Coast Football League and J. R. Klawans.

Receipt of copy acknowledged.

[Endorsed]: Filed April 13, 1954.

In the District Court of the United States for the Northern District of California, Southern Division

No. 28988-R

WILLIAM RADOVICH,

Plaintiff,

vs.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

ORDER GRANTING MOTION TO DISMISS

This matter having been argued, briefed and submitted for ruling,

It Is Ordered that defendants' motion to dismiss be, and the same hereby is, Granted.

Dated: April 30th, 1954.

/s/ GEORGE B. HARRIS,
United States District Judge.

Toolson vs. New York Yankees,
346 U. S. 356;

Federal Baseball Club vs. National League,
259 U. S. 200.

[Endorsed]: Filed April 30, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that William Radovich, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the

Order granting defendants' motion to dismiss his complaint, entered in this action on April 30, 1954.

Dated: May 28, 1954.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed May 28, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint.
Interrogatories.
Answer to interrogatories.
Notice of objection of defendant, J. Rufus Klawans, to plaintiff's interrogatories and motion for an order for the protection of defendant and for an extension of time to answer certain interrogatories.
Interrogatories.
Interrogatories.
Motion to dismiss and motion to set for hearing.

Notice of motion of defendant, National Football League, to quash purported service of summons and to dismiss complaint.

Affidavit of Bert Bell in support of motions to dismiss.

Affidavit of J. Rufus Klawans in support of motions to dismiss.

Affidavit of Mary McCullough in support of motion of National Football League to dismiss.

Notice of motion of defendant, New York Football Giants Club, Inc., to dismiss complaint.

Affidavit of John V. Mara in support of motion of defendant, The New York Football Giants, Inc., to dismiss.

Notice of motion of defendant Chicago Cardinals Football Club, Inc., to dismiss complaint.

Affidavit of Ray Bennigsen.

Notice of motion of defendant Detroit Football Company to dismiss complaint.

Affidavit of Lewis Cromwell.

Notice of motion of defendant Chicago Bears Football Club, Inc., to dismiss complaint.

Affidavit of George S. Halas.

Affidavit of Daniel F. Reeves.

Notice of motion of defendant Los Angeles Rams Football Club to dismiss complaint.

Notice of objections of defendant, National Football League, to plaintiff's interrogatories and motion for an order for the protection of defendant and for an extension of time to answer certain interrogatories.

Notice of objections of defendant, Chicago Cardinals Football Club, Inc., etc., et al., to plaintiff's interrogatories, etc.

Answers to interrogatories by defendant National Football League.

Answers to interrogatories by defendant Los Angeles Rams Football Club.

Answers to interrogatories by defendant The New York Football Giants, Inc.

Answers to interrogatories by defendant Chicago Bears Football Club, Inc.

Answers to interrogatories by defendant Detroit Football Company.

Answers to interrogatories by defendant Chicago Cardinals Football Club, Inc.

Notice of motion of defendant The Philadelphia Eagles, Inc., to quash purported service of summons and to dismiss complaint.

Affidavit of Anthony J. Morabito in support of motion of defendant, The Philadelphia Eagles, Inc., to quash purported service of summons and to dismiss complaint.

Affidavit of Paul Lewis.

Order on motions to quash, etc.

Motion to strike portions of complaint by defendant National Football League.

Motion to strike portions of complaint by defendants, Chicago Cardinals Football Club, Inc., New York Football Giants, Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club.

Order denying motion to strike.

Answer of various defendants.

Answer of defendant J. Rufus Klawans.

Stipulation for removal of action from trial calendar.

Notice of motion for dismissal of complaint.

Notice of motion for dismissal of complaint.

Order granting motion to dismiss.

Notice of appeal.

Cost bond on appeal.

Appellant's designation of record.

Deposition of George S. Halas.

Deposition of William Radovich.

Deposition of George Preston Marshall.

Notice of motion to continue trial.

Affidavit in support of motion for continuance of trial.

Order removing cause from trial calendar.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 16th day of June 1954.

C. W. CALBREATH,
Clerk;

By /s/ WM. C. ROBB,
Deputy.

In the District Court of the United States for the Northern District of California, Southern Division

No. 28988

WILLIAM RADOVICH,

Plaintiff,

vs.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

JUDGMENT

Defendants, Pacific Coast Football League, J. Rufus Klawans, National Football League, Chicago Cardinals Football Club, Inc., New York Football Giant Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club, having moved for a dismissal of this cause under Rule 12(b) on the grounds that the complaint indicates a lack of jurisdiction in the court over the subject matter; and that the complaint fails to state a claim upon which relief can be granted; and said motion having been duly argued by counsel, both orally and upon written memoranda, and the court having granted defendants' motion to dismiss:

It Is Therefore Ordered and Adjudged that plaintiff's action be and it hereby is dismissed.

Dated: Sept. 17, 1954.

/s/ GEORGE B. HARRIS,
United States District Judge.

Approved as to form as provided in Rule 5(d) of the Rules of Practice of the District Court of the United States for the Northern District of California.

/s/ J. BRUCE FRATIS,
Attorney for Pacific Coast Football League and J. Rufus Klawans.

/s/ MARSHALL E. LEAHY,
Attorney for Other Defendants.

JOSEPH L. ALIOTO,
MAXWELL KEITH,
ELWOOD S. KENDRICK,
By /s/ MAXWELL KEITH,
Attorneys for Plaintiff.

[Endorsed]: Filed September 17, 1954.

[Endorsed]: No. 14394. United States Court of Appeals for the Ninth Circuit. William Radovich, Appellant, vs. National Football League, et al., Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 16, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that William Radovich, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Judgment of Dismissal, entered in this action on September 20, 1954.

Dated: September 20, 1954.

/s/ MAXWELL KEITH,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed September 20, 1954.

United States Court of Appeals
for the Ninth Circuit
No. 14,394

WILLIAM RADOVICH,

Appellant,

vs.

NATIONAL FOOTBALL LEAGUE, et al.,

Appellees.

APPELLANT'S STATEMENT OF POINTS ON APPEAL

To: The Honorable Chief Justice and Associate Justices of the United States Court of Appeals for the Ninth Circuit.

Appellant respectfully states that the following are the points upon which he intends to rely on appeal:

1. The trial court erred in dismissing plaintiff's complaint on the ground that organized professional football is not within the scope of the federal antitrust laws.

2. The trial court erred in not ruling that plaintiff's complaint stated a good and sufficient action for injuries resulting from violations of recognized common law restraints of trade regardless of the application of the federal antitrust statutes to organized professional football.

Appellants designate the following documents and points of the record which they think necessary for the consideration of the foregoing points on appeal, to wit:

/s/ MAXWELL KEITH,
Attorney for the Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 17, 1954.

[fol. 73] ARGUMENT AND SUBMISSION—SEPTEMBER 15, 1955

(OMITTED IN PRINTING)

[fol. 74] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: STEPHENS, FEE and CHAMBERS, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—March 27, 1956

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 75] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,394

WILLIAM RADOVICH, *Appellant*,

vs.

NATIONAL FOOTBALL LEAGUE, et al., *Appellee*.

On Appeal from the United States District Court for the Northern District of California, Southern Division

OPINION—MARCH 27, 1956

Before: STEPHENS, FEE and CHAMBERS, Circuit Judges.

CHAMBERS, CIRCUIT JUDGE:

William Radovich is a one time football great from the University of Southern California. From there he went on to Detroit to play professional football in the years 1938-1941 and 1945, with the Detroit Lions, a member of the National Football League. His playing there was interrupted by service in the Navy during World War II. With the Lions, Radovich as a professional was as success-

ful, if not more so, than he had been as an amateur at Southern California.

In 1946 Radovich signed to play at an increase in salary with the Los Angeles Dons, a football organization outside the ties of the National Football League. Eventually, he wanted, he says, re-employment by the Detroit Lions or by other football organizations of the National League. But he says up to the filing of his complaint, he could find no further employment as a football player with teams affiliated with the National League because when he joined the Los Angeles Dons he broke his contract with the Detroit Lions. He violated the "reserve clause," long established in baseball and now a standard provision of contracts of member clubs of National. Shortly stated, the reserve clause in a player's contract ties the player to his club and he cannot go to another club without the consent of [fol. 76] the club holding his contract. Violation of the clause results in a five year suspension which Radovich received when he joined the Dons.

Radovich, perhaps with a prescience that anticipated United States v. International Boxing Club, 348 U. S. 236, filed suit in the U. S. District Court for the Northern District of California against the National Football League and others. He alleges a violation of the federal anti-trust statutes. He says his troubles are due to the defendants' violations. Carefully it is pleaded that professional football, in reality, is played on a stage or arena from which interstate broadcasting and telecasting originate; that the game is a business, the show of which is really inter-related with television and radio broadcasting. He says the latter are not mere incidents to the show. Then he asked for treble damages and for injunctive relief.

The League and other defendants, in their answer, say:

1. They haven't conspired against Radovich and they haven't hurt him.

2. Radovich at 35 is just an old man in his profession and no longer employable by major teams. (The poignancy of that, if true, is obvious.) So, they suggest he has gone into the business of litigation.

3. The business of professional football is dependent on having teams of reasonably comparable strength. The re-

serve clause which keeps players from being free agents prevents the players from going into the market place seeking annual bidders. Prevention of this tends to prevent the strong from becoming stronger and the weak weaker.

4. The whole thing in professional football is the "game": the spectacle on the field which the crowd sees. The television and radio aspects are trifling.

Pursuant to stipulation of the parties, defendants' motion to dismiss was held under advisement until the decision in Toolson v. New York Yankees, 346 U. S. 356, was announced. Then the complaint was dismissed by the district judge. Radovich appeals.

The League relies on Toolson and its parent, Federal Baseball Club v. National League, 259 U. S. 200. Radovich [fol. 77] says the International Boxing case governs and his complaint should not have been dismissed. Which of the two tides catches professional football? We confess that the strength of the pull of both cases is about equal.

Federal Baseball v. National League survived in Toolson, we believe, only because of the historical indulgence of the Congress in not specifically bringing the sport under the anti-trust acts for 30 years after the former decision was announced. Radovich says United States v. International Boxing means that only the professional sport of baseball is left with an immunity from the application of the Sherman and Clayton Acts and that the immunity of baseball is really a historically accident. It is a good argument.

However, no one has suggested that the difference between Toolson and International Boxing lies in the fact that it is probably the public belief that professional baseball has kept a cleaner house than professional boxing. (No slur on many, many fine men in the boxing profession is intended.) To us it seems that, caught in between the commands of the two cases, we should determine our ruling by the answer to the query: Is professional football business or sport more like the business of boxing or like the business of baseball?

If our first step is correct: that we have the right to compare, then the second one is obvious. Football is a team sport. Its operation has just about the same aspects as

baseball. Boxing is an individual sport. In professional football, very good arguments do exist for the indulgence of restraints on individual players. Of course, such indulgence could not stand against the positive commands of the Congress. In boxing, arguments for restraints on the individual's right to contract seem rather hollow.

Further, it appears reasonable to us to assume that if Congressional indulgence extended to and saved baseball from regulation, then the indulgence extended to other team sports.

Further, even though International Boxing governs here, we are confident plaintiff has not stated a claim. As said in Fedderson v. Ward, 10 Cir., 180 F. 2d 519 at 522, "A general allegation * * * is not enough. While detail is not necessary, it is essential that the complaint allege facts [fol. 78] from which it can be determined as a matter of law that by reason of intent, tendency or the inherent nature of the contemplated acts, the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce."

Distilled, plaintiff's allegation is really that there was a conspiracy to eliminate football leagues not affiliated with National, particularly another league called the All America Conference. The alleged methods would be control of players by the reserve clause and blacklists. (It seems doubtful that restraint on Radovich and others so situated is a restraint on interstate commerce.)

And if he is to recover at all, it is more probable his must be a derivative right springing from the allegation of intent to "boycott and ruin the All America Conference." Within the four corners of the complaint, we doubt that the alleged means, restraint by the reserve clause and its enforcement, is legally sufficient to support, without more, a conclusion that these means were calculated to prejudice the public or unreasonably restrain interstate commerce. According to Radovich, he in fact was able to play for the All America Conference team and at a higher salary. He alleges that he couldn't play for National League teams any longer.

We fail to discover any basis to say that the appellant has pleaded that All America or any other league was ruined, would be ruined or substantially affected by the complained

of acts. The result cannot be presumed as a matter of law. In International there was alleged a collection of overt acts, which if true, lead easily to the conclusion (if boxing be commerce among the states) that the public was adversely affected. There it easily flows from the allegations that a top-flight boxer could not obtain top-flight matches if he did not let International "own his soul." Effect on the public interest there requires no searching or speculation.

Judgment affirmed.

[File endorsement omitted.]

[fol. 79] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,394

WILLIAM RADOVICH, *Appellant*,

vs.

NATIONAL FOOTBALL LEAGUE, et al., *Appellee*.

JUDGMENT—MARCH 27, 1956

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the Appellees and against the Appellant.

IT IS FURTHER ORDERED and adjudged by this Court that the Appellees recover against the Appellant for their costs herein expended and have execution therefore.

[File endorsement omitted.]

[fol. 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 94

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 8, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2277-2)

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MAY 18 1956
HAROLD B. WILLEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. ~~954~~ 94

WILLIAM RADOVICH,

Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE, BERT BELL, J. RUFUS KLAWANS, BOSTON YANKS, NEW YORK RANGERS, NEW YORK GIANTS CLUB, PHILADELPHIA EAGLES, THE LOS ANGELES RAMS FOOTBALL CLUB, INC., PITTSBURGH STEELERS FOOTBALL CLUB, WASHINGTON REDSKINS, CHICAGO BEARS FOOTBALL CLUB, INC., CHICAGO CARDINALS FOOTBALL CLUB, DETROIT LIONS FOOTBALL CLUB, GREEN BAY PACKERS, SAN FRANCISCO CLIPPERS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

MAXWELL KEITH,
111 Sutter Street, San Francisco 4, California.
Attorney for Petitioner.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No.

WILLIAM RADOVICH,

Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE, BERT BELL, J. RUFUS KLAWANS, BOSTON YANKS, NEW YORK RANGERS, NEW YORK GIANTS CLUB, PHILADELPHIA EAGLES, THE LOS ANGELES RAMS FOOTBALL CLUB, INC., PITTSBURGH STEELERS FOOTBALL CLUB, WASHINGTON REDSKINS, CHICAGO BEARS FOOTBALL CLUB, INC., CHICAGO CARDINALS FOOTBALL CLUB, DETROIT LIONS FOOTBALL CLUB, GREEN BAY PACKERS, SAN FRANCISCO CLIPPERS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Ninth Circuit entered in the above entitled case on March 27, 1956.

CITATIONS TO OPINIONS BELOW.

The order of the trial Court is unreported and appears at Tr. 64. The opinion of the Circuit Court of Appeals is as yet unreported and appears attached hereto as Appendix A.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on March 27, 1956 (R. 79, Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether a combination of football club corporations and partnerships, an association composed of said corporations and certain individuals alleged to have perpetrated a boycott against petitioner, which prevented him from playing or coaching football with the National Football League and others, are exempt from the application of the Sherman Antitrust Act because football is a team sport?

2. Whether a complaint for injuries by a private party under Section 4 of the Clayton Act is sufficient if it states violations of the antitrust laws and injury thereby?

STATUTES INVOLVED.

The statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2 and Section 4 of the Clayton Act, 15 U.S.C. Sec. 26. These are printed and attached hereto as Appendix C.

STATEMENT.

Petitioner's complaint was filed on July 5, 1949 (Tr. 3-18). The complaint alleges that defendants, the various teams in the National Football League, the league itself, and individuals attempted to monopolize interstate commerce in the business of professional football (Tr. 7-10). The defendants, it was alleged, tied football players to a particular member club and prevented players from becoming free agents by means of a reserve clause and a blacklist. These devices, it was alleged, prevented the player from obtaining competition among the member clubs for his services, or from being able to play for competitive organizations for fear of being never again able to play for respondents (Tr. 10). Petitioner commenced his career with the Detroit Lions of the National Football League (Tr. 10). Petitioner, it was alleged, had dire necessity to be able to play football in Los Angeles where his father became seriously ill in July 12, 1945 (Tr. 13), but was met with an ultimatum that he return to Detroit and could not play for the Los Angeles Rams of the National Football League (Tr. 13-14). Consequently, petitioner commenced playing for a team in a competitive league, the All-America

Conference, the Los Angeles Dons (Tr. 14). But when he attempted to seek employment as a player coach in San Francisco with a team associated with the Pacific Coast League, the San Francisco Clippers, alleged by respondents to be independent of the National Football League (Tr. 37-39), an organized boycott between this league and the National Football League prevented the completion of the contract (Tr. 14-15). Petitioner subsequently was unable to play or coach for any team of the National Football League or Pacific Coast League. (*id.*)

The answers of the defendants' reply to the allegations of interstate commerce are in the mold and language of *Federal Baseball Club v. National League,* 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (Tr. 24-28). They admit the uniform and cooperative imposition of a standard reserve clause on football players and admit that if a player violates this reserve clause he automatically cannot play National League football for five years (Tr. 28-30, 35). The reserve clause in question binds the player not to sign a contract with or play for any club other than the club which originally employed him or its assignee (Tr. 10).

On April 30, 1954 the complaint was dismissed on authority of *Toolson v. New York Yankees,* 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (Tr. 64) and the judgment (Tr. 69) was upheld by the Circuit Court of Appeals for the Ninth Circuit on the following grounds: (1) That football is a team sport as is baseball and therefore reasonably entitled to exemption from the antitrust laws. (2) That the Court cannot

discover any basis, without search or speculation, that the complaint shows the public interest is affected by the allegations of the complaint; and (3) that the Court cannot discover that the imposition of a uniform player contract by agreement of all clubs, which ties every football player in the league to a particular club in perpetuity on option of the employer and which prevents him from playing with competitive organizations on fear of blacklisting and boycotting, is a means which may restrain interstate commerce or is prejudicial to the public.

The Circuit Court of Appeals thus did not, in ruling on a judgment affirming the dismissal of a complaint, discuss whether or not the complaint stated violations of the antitrust laws. It chose, rather, to attempt if it could discover, without an examination of the violations charged, a prejudicial effect on the public. Failing in such search, it prevented petitioner from obtaining a trial by jury under Section 4 of the Clayton Act, Appendix C herein.

REASONS FOR GRANTING THE WRIT.

I.

IN ASSUMING THAT PROFESSIONAL FOOTBALL IS EXEMPTED FROM THE ANTITRUST LAWS THE COURT HAS DEPARTED FROM THE COMMAND IN U. S. v. INTERNATIONAL BOXING CLUB OF N.Y., THAT THE COURTS CANNOT IMPLY EXEMPTIONS FROM THE ANTITRUST LAWS.

Petitioner respectfully states that the Court below cannot imply a legislative exemption for organized professional football in view of this Court's very

recent ruling that the federal Courts cannot imply exemptions under the antitrust laws for any organization. At page 3 of the Circuit Court of Appeals for the Ninth Circuit's opinion, it was stated:

> "Further, it appears reasonable to us to assume that if Congressional indulgence extended to and saved baseball from regulation, then the indulgence extended to other team sports."

But in *U. S. v. International Boxing Club of N. Y.*, (1955) 348 U.S. 236, 244, 75 S.Ct. 259, 263, 99 L.Ed. 290, 296, this Court stated as to organized boxing:

> "Yet the defendants in the instant case are now asking this Court for the same exemption which enactment of these Bills would have afforded Their remedy, if they are entitled to one, lies in further resort to Congress, as we have already stated."

The basis of the *International Boxing* decision, it would seem, is that the Courts cannot exempt any business, trade or sport from the antitrust laws which must be viewed with respect to their interstate activities; that is, whether they are in interstate commerce or their activities affect interstate commerce. The allegations as to interstate commerce in petitioner's complaint are in the same cast and mold as are those allegations of interstate commerce used by the U.S. in *The Boxing Case,* supra, and set forth at pages 348 U.S. 238, 239 of this Court's opinion. Petitioner herein has averred, as did the government, that defendants (each it is noted is located in different sections of the United States) make substantial utilization of

the channels of interstate trade and commerce, to-wit: that respondents negotiate contracts with nation-wide broadcasting and television companies, that respondents obtain substantial remuneration from said receipts, that there is constant and continuous travel across state lines, and that respondents sent blacklists throughout the country (Tr. 9-10, 25). Even the answers of the defendants add elements to the action which were pleaded in the *Boxing* case, to-wit: they lease football stadiums throughout the United States, they arrange interstate schedules for both non-league and league games, and they suspend players for five years throughout the United States on violation of the reserve clause, which means players cannot play at these stadiums pursuant to the interstate scheduling (Tr. 24-30).

It is manifest that the decision below is in direct conflict with *U.S. v. International Boxing Club,* supra, and *U.S. v. Schubert,* (1955) 348 U.S. 222, 75 S.Ct. 277, 99 L.Ed. 279, where the making and performing of contracts throughout the United States and the transmission of communications through interstate channels was held to subject the United Booking Office and others to the application of the Sherman Act. See also *U.S. v. Employing Plasterers Assoc.,* 347 U.S. 186, 74 S.Ct. 452, 98 L.Ed. 618; *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328; *U.S. v. Women's Sportswear Mfrs. Assoc.,* 336 U.S. 460, 69 S.Ct. 714, 93 L.Ed. 805; *Moore v. Mead's Fine Bread Co.,* 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145.

II.

IN RULING THAT THE COMPLAINT MUST SET FORTH ALLEGATIONS SHOWING "PUBLIC INJURY" THE COURT HAS DEPARTED FROM ACCEPTED TRADITION AND IS IN CONFLICT WITH THE GENERAL RULE THAT A PRIVATE PARTY NEED ONLY ALLEGE VIOLATION OF THE ANTITRUST LAWS AND INJURY THEREBY.

It is submitted that prior to 1950, *Fedderson Motors, Inc. v. Ward* (10th Cir., 1950), 180 F. 2d 519, on a review of a motion to dismiss, that once it was established defendants were not exempt from the antitrust laws and that allegations of interstate commerce were sufficient, that the Court would next determine if the complaint alleged violations of the antitrust laws. This is all that Section 4 of the Clayton Act says it should do (Appendix C herein).

> "That any person who shall be injured in his business or property by reason of *anything forbidden in the antitrust laws*. . . ." (Emphasis added.)

The *Fedderson* case, however, establishes an additional requirement that the complaint convince the Court of an inherent prejudice to the public. But the great and overwhelming weight of authority since 1890 has held that the only requirements for a private person under this section to state a cause of action are (1) to allege violations and (2) to allege injury thereby.

As early as 1907 the 3d circuit stated in *Wheeler Stenzel Co. v. Nat'l Window Glass Jobbers Ass'n*, 152 Fed. 864, 874, to-wit:

"It is manifestly the correct understanding of the seventh section of the act that where a man is harmed in his business or property by a violation of the act, he has suffered a legal injury and is entitled to his action therefor."[1]

And the 1st Circuit in *Albert Peck Barth Co. v. Mitchell Woodbury Corp.*, 57 F. 2d 96, in 1932 stated:

"To constitute an offense under Section 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate commerce, to show the public was affected and to what extent."

And in *Monarch Tobacco Works v. American Tobacco Co.*, the Circuit Court in Kentucky stated in 1908, 165 Fed. 774, 777:

"All that is necessary to support the action is that business or property of the complainant shall have been in some way injured by reason of the illegal scheme."

And the 2nd Circuit in *Gardella v. Chandler*, 172 F. 2d 402, held in 1949 that a baseball player was entitled to a trial by jury under the Sherman Act when the

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[1]Sec. 7 of the Sherman Act was repealed by Public Law 137, 84th Congress, 1st Session, effective January, 1956. It read as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

baseball league prevented the plaintiff from obtaining employment in its ranks after a flight to Mexico. It is noted that petitioner here was prevented from obtaining employment with a club alleged by defendants to be wholly independent of them (Tr. 37-39). See also *Ring v. Spina,* (2d Cir., 1945), 148 F. 2d 647, 186 F. 2d 639, cert. denied, 341 U.S. 935, 71 S.Ct. 854, 95 L.Ed. 1363; *Marinielli v. United Booking Offices of America,* (D.C. S.D. N.Y., 1914), 227 Fed. 165.

It is manifest that the instant opinion of the Ninth Circuit in conjunction with *Fedderson Motor Co. v. Ward,* (10th Cir., 1950) 180 F. 2d 519, raises a conflict in the circuits which ought to be settled by this Court.

The precise issue is whether or not a private party under Section 4 of the Clayton Act has stated a good and sufficient cause if he alleges violation of the Act and injury thereby. It is submitted that a pleaded and proven violation of a statute enacted to protect the public and legislated for its protection would, in logic and justice, be sufficient unto itself. The *Fedderson* case, *ibid.*, relies on *Shotkin v. General Electric Co.* (10th Cir., 1948), 171 F. 2d 236, but the *Shotkin* Court only stated at 239, in an action *pro se,* that the complaint "must contain general allegations from which it could be determined as a matter of law that the defendants did in fact violate the act with resulting damages to plaintiff." It, in turn, relied on *Glenn Coal v. Dickinson* (4th Cir., 1934) which, indeed, held at 72 F. 2d 885, 887:

> "To recover, the plaintiff must establish two things: (1) a violation of the Anti Trust Act and

> (2) damages to the plaintiff proximately resulting from the acts of the defendants which constitute a violation of the Act."

Thus it is respectfully asserted that the requirement of pleading "public injury" is a new doctrine which the Ninth and Tenth Circuits have seized upon, by use of dicta, to allow summary rejection of a complaint. It must further be asserted that the private antitrust action is now subject to a doctrine which, if not settled, will further add to the complications and scope of pleading and trial. It is a strained and illogical doctrine and a doctrine whose use is contrary to the statements in *City of Atlanta v. Chattanooga Pipe and Foundry* (6th Cir., 1903), 127 Fed. 23, 27, affirmed, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241 (1906) that:

> "Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of the law. The act gives the remedy to 'any person' injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act."

Roseland v. Phister, (7th Cir., 1942) 125 F. 2d 417, a landmark private action case, held a cause of action was stated by an agent of the defendant principal who conspired to deprive him of his job opportunities.

That the circuits are in clear conflict over the new doctrine of public injury may be seen in *National*

Used Car Market Report, Inc. v. National Auto Dealers Association, et al., (1952) 200 F. 2d 359, 360, where the 2nd Circuit stated:

> "We think it might be determined as a matter of law that the broad trade boycott here alleged is reasonably calculated to prejudice the public interest. However that may be, we think it is not necessary to make specific allegations of proof of public injury in order to show that a trade boycott of such breadth violates the Sherman Act."

Thus the Second and Ninth Circuits are clearly split on a complaint containing allegations of trade boycott.

III.

IN FAILING TO FIND "PUBLIC INJURY" INHERENT IN THE COMPLAINT CHARGING A CONSPIRACY TO BOYCOTT, THE COURT DEPARTED FROM THE ACCEPTED DOCTRINE THAT RESTRAINTS ON THE RIGHT TO PRACTICE A CALLING INHERENTLY INVOLVE THE PUBLIC INTEREST AND GOOD. EACH ALLEGATION OF VIOLATION OF THE ANTITRUST LAWS ESTABLISHES ILLEGALITY AND INHERENT PUBLIC INJURY.

It is respectfully submitted that an examination of the allegations of violations of the antitrust laws in petitioner's complaint, and the persuading reasons for their illegality, would lead to no other conclusion than that the complaint alleges violations of the antitrust laws which have inherent adverse effect on the public. The complaint alleges the following violations of the Sherman Act: (1) respondents attempted by unlawful combination and contract to control, regu-

late and dictate the terms upon which organized professional football shall be played throughout the United States (Tr. 9). This Court has repeatedly held that any combination or association of individuals who surrender their individuality to an association and create, in the process, an extra governmental agency whose purpose is to control competition, is illegal. *U. S. v. Associated Press,* (1945) 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013; *Fashion Originators' Guild v. Federal Trade Commission,* (1941) 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949. The inherent evil to the public of a combination of individuals into an association with monopoly power is fundamental to the Acts' enactment. *Standard Oil Co. of New Jersey v. U. S.,* (1911) 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619; *U. S. v. Terminal Railroad Ass'n. of St. Louis,* (1912) 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810; *U. S. v. South-Eastern Underwriters Ass'n.,* (1944) 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440; *U. S. v. Griffith,* (1948) 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236; *U. S. v. Socony Vacuum Oil Co.,* (1940) 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129; *U. S. v. Corn Products Refining Co.,* (S.D.N.Y., 1916) 234 Fed. 964; *U. S. v. Aluminum Co. of America,* (2d Cir., 1945) 148 F. 2d 416. The evils of a monopoly pool of capital and uniform association rules which provide exclusive rights to player talent and provide uniform blacklisting conditions are not different when applied to a sport than applied to any other type of business.

(2) Respondents adopted uniform players' contracts, containing reserve clauses, published by the

National League (Tr. 10). The uniform adoption of industry regulatory contracts are in violation of the antitrust laws. *U. S. v. Associated Press*, supra, *Fashion Originators' Guild v. Federal Trade Commission*, supra. As was stated by Justice Black in the *Guild* case, 312 U.S. 457, 466; 61 S.Ct. 702, 707; 85 L.Ed. 949.

> "Petitioners, however, argue that the combination cannot be contrary to the policy of the Sherman and Clayton Acts, since the Federal Trade Commission did not find that the combination fixed or regulated prices, parcelled out a limited production, or brought about a deterioration in quality. But action falling into these three categories does not exhaust the type of conduct banned by the Sherman and Clayton Acts. For as this Court has said, 'Trade or commerce under these circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to the altered surroundings. Mere reduction in price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all powerful combination of capital.' *U. S. v. Trans-Missouri Freight Assoc.*, 166 U.S. 290, 323; 17 S.Ct. 540, 552; 41 L.Ed. 1007."

As was stated in *Ring v. Spina* (2nd Cir., 1945) 148 F. 2d 647, 650:

> "It is now well settled that a contract covering a large part of an industry will be void and illegal under the Sherman Act for such restrictive agree-

ments and that these constitute adequate proof of a combination in restraint of trade."

Attempts to obtain all first class performers and subject them to exclusive service was analyzed by Judge Learned Hand in *Marienelli, Ltd. v. United Booking Offices of America* (S.D. N.Y. 1914) 227 Fed. 165, 171, wherein he stated:

> "The necessary inference is that the defendants, if successful, will control all 'first class' performers and succeed in monopolizing the supply. This, in turn, enables them to control the whole business, and constitutes the very conditions which the Sherman Act means to prevent. If in execution of that project they injure the plaintiff, the resulting damages are within the seventh section of the act."

The inherent economic effect of uniform reserve clauses are to keep member clubs of the National Football League from competing for the price of talent, and to drive down, thereby, the player's salaries. Further, they prevent competitive clubs from obtaining needed talent. The first is a *per se* restraint of trade even though it involves the salaries of players. For as this Court said in an action involving salaries of real estate agents, *U. S. v. National Ass'n. of Real Estate Bds.* (1950) 339 U.S. 485, 489, 70 S.Ct. 711, 714, 94 L.Ed. 1007, 1012:

> "It is not for the courts to determine whether in particular settings price-fixings serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of

> consenual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve."

See also *American Medical Association v. U. S.* (1943) 317 U.S. 519, 63 S.Ct. 328, 87 L.Ed. 434; *Atlantic Cleaners & Dyers v. U. S.* (1932) 286 U.S. 427, 52 S.Ct. 607, 76 L.Ed. 1204.

The inherent tendency of exclusion of others in reserve clauses is equally a violation of the antitrust laws. *U. S. v. Schubert,* supra. In the *Associated Press* case this Court stated at 326 U.S. 1, 15, 65 S.Ct. 1416, 1422, 89 L.Ed. 2013, 2027,

> "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy and sell the things in which the group compete."

This exclusion was specifically applied in petitioner's complaint to the then competing All-America Conference (Tr. 16). Since said time this Conference has been merged with respondents. (3) That the respondents uniformly blacklist players who violate the reserve clause (Tr. 10). It is settled that a conspiracy to blacklist and/or boycott is a violation of the antitrust laws. *Fashion Originators' Guild v. Federal Trade Commission* (2nd Cir. 1940) 114 F. 2d 80, affirmed, 312 U.S. 456, 61 S.Ct. 703, 85 L.Ed. 949. The gravamen of this action is the conspiracy to boycott petitioner to prevent his playing with the Pacific Coast League in an effort to enforce industry-wide regulation.

(4) That the respondents forced petitioner to sign a reserve clause restraining his playing football for anyone else but one club for life and in effect throughout the U. S. and boycotted him on its violation (Tr. 11, 14-15). Assuming that all the above violations by respondents are in some way protected or exempt from the antitrust laws because of the necessity of competitive sports, the above allegations, even when applied to a single football player are in violation of the antitrust laws and *inherently cause public injury.* Petitioner's action is based on centuries of tradition which have held single restrictive restraints on occupation illegal as against public policy. The common law on the subject of restraints on occupations is set forth in great detail in *U. S. v. Addyston Pipe and Steel Co.* (6th Cir. 1899) 85 Fed. 271, by Justice Taft. It is settled that the antitrust laws incorporated the common law on restraints of trade, *U. S. v. Standard Oil of New Jersey,* supra.

The public policy of protecting the right to practice a calling free from monopoly restraints, so obnoxious to a free society, thus were incorporated into the antitrust laws and redress allowed by the United States Congress.

In *Oregon Steam Navigation Co. v. Winsor* (1874) 87 U.S. 64, 67, 22 L.Ed. 312, 318, this Court stated:

> "Of course, a contract not to exercise a trade generally would be obnoxious to the rule and would be void. * * *
>
> There are two principle grounds on which the doctrine is founded, that a contract in restraint

> of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry, the other is, the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when contract is general, not to pursue one's trade at all or not to pursue in the entire realm or country."

Thus the restriction on a right to practice a calling has inherent public injury, and a conspiracy to destroy this right, even though exercised against one individual, involves public injury. It would appear manifest that in an action involving restraints on the right to practice a calling, abhorrent to the common law[2] which became incorporated into our anti-trust laws; that there is breach of centuries of doctrine and Congressional protection of private rights should a Court prevent the action from going to a jury based on lack of allegations of public injury. A boycott against a man's right to practice a calling is coextensive with the public good. See *Roseland v. Phister,* 125 F. 2d 417. As the complaint specifies, the blacklist and boycott against petitioner has existed since 1948 and has prevented him from coaching as well as playing football (Tr. 15).

In the *Gardella* case, supra, Judge Jerome Frank stated at 409:

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[2]In the famous *Dyers* case, 2 Hen. V, 5 pl. 26 (1415), Dyer not to pursue his trade in a town for six months—the shocked English judge stated, "Per dieu, if the plaintiff were here, he should go to prison till he had paid a fine to the King".

"For the 'reserve clause' as has been observed results in something resembling peonage to the baseball player."

The decision of the Court below departs from the inflexible command of this Court that Congress is presumed to have exercised the full extent of its powers over interstate commerce in the enactment of the Sherman Act. *U. S. v. South-Eastern Underwriters Ass'n.* (1944) 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440. In its conclusion that an organization, individual clubs and private parties are exempted from the Sherman Act, the Court below has ruled clearly inconsistent with statements of this Court in the recent *Boxing* and *Schubert* decisions that exemption is a matter for Congress and not the Courts.

The doctrine of "public injury" departs from the certain and specific standard of searching the complaint for violations of the antitrust laws, and is inconsistent, thereby, with the principle heretofore shown as requiring the private suitor to allege only violations of the antitrust laws and injury thereby.

The doctrine of "public injury" is inconsistent with the same Court's emphasis on the requirement of "private injury". See *Wolfe, et al. v. National Lead Co., et al.*, 225 F. 2d 427, cert. denied, 350 U.S. 915, 76 S.Ct. 198, 100 L.Ed. 128 (a nonsuit case). For the private antitrust action is by its very nature an

action for private injury, and to subject it to a test of "public injury" apart from the violations charged creates in the judiciary an extraordinary power to prevent the action from reaching a jury. On the one hand, "private injury" is subject to a severe test of proof of injury. *Wolfe v. National Lead,* supra. But if the injury to the plaintiff be without doubt, the "private injury" is subject to a test that it involve "public injury", allowing a seesaw of legal doctrine to prevent the private litigant from reaching a jury. Further, the doctrine of public injury is used in a setting of express assumption of violation of the antitrust laws. Thus the action sponsored by Congress to enforce respect for the antitrust laws becomes subject to a judicial prerogative of preventing the action from reaching the jury in spite of assumed violation of the law. In *Wilkerson v. McCarthy* (1949) 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497, the grounds for the acceptance of the petition was based on the attitude of the Courts with respect to disallowing jury trials under the Federal Employers Liability Act, 45 U.S.C.A. 51-60.

The doctrine of allegation of "public injury" as used by the Court below is a vague, uncertain and indefinite doctrine, and allows the Courts to apply differing notions of what it considers inherent public injury without examination of the violations alleged.

Judge Taft in *U. S. v. Addyston Pipe and Steel Co.* (6th Cir. 1898) 85 Fed. 271 at 283-284 warned:

> "It is true that there are some cases in which the courts, mistaking, as we conceive, the proper

> limits of relaxation of the rules for determining the unreasonableness of the restraint of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest and how much is not. The manifest danger in the administration of justice according to so shifting, vague and indeterminate standard would seem to be a strong reason against adopting it."

This Court has steadfastly refused to allow the antitrust laws to become "a sea of doubt" and the steady development of "per se" doctrines by this Court exhibits for all that it is contrary to antitrust enforcement policy to unduly extend the sphere of judicial prerogative in this field. *U. S. v. Socony Vacuum Oil Co.* (1940) 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129; *Fashion Originators' Guild v. Federal Trade Commission,* supra; *U. S. v. International Salt* (1947) 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20; *U. S. v. Griffith* (1948) 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236; *U. S. v. Paramount Pictures, Inc.* (1948) 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260.

The private antitrust action is a necessary part of Congress's war on illegal monopoly and restraints of trade. *Bruice's Juices v. American Can Co.* (1947) 330 U.S. 743, 67 S.Ct. 1015, 91 L.Ed. 1219.

Yet this enforcement action is now subject to a "sea of doubt" which ought to be, it is respectfully urged, charted by this Court. It is respectfully sub-

mitted that Congress intended to and gave private redress in the antitrust laws to a petitioner, such as herein, whose life and pursuit of happiness has been made subject to illegal monopoly and restraint of trade. A conspiracy to boycott an individual involving a *per se* violation of antitrust law has been allowed to escape with impunity and without judgment by his peers.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
May 14, 1956.

Respectfully submitted,
MAXWELL KEITH,
Attorney for Petitioner.

(Appendices A, B and C Follow.)

Appendix A

United States Court of Appeals
for the Ninth Circuit

William Radovich, Appellant, vs. National Football League, et al., Appellee.	No. 14,394 Mar. 27, 1956

On Appeal from the United States District Court
for the Northern District of California,
Southern Division.

Before: Stephens, Fee and Chambers, Circuit Judges.

Chambers, Circuit Judge:

William Radovich is a one time football great from the University of Southern California. From there he went on to Detroit to play professional football in the years 1938-1941 and 1945, with the Detroit Lions, a member of the National Football League. His playing there was interrupted by service in the navy during World War II. With the Lions, Radovich as a professional was as successful, if not more so, than he had been as an amateur at Southern California.

In 1946 Radovich signed to play at an increase in salary with the Los Angeles Dons, a football organ-

ization outside the ties of the National Football League. Eventually, he wanted, he says, re-employment by the Detroit Lions or by other football organizations of the National League. But he says up to the filing of his complaint, he could find no further employment as a football player with teams affiliated with the National League because when he joined the Los Angeles Dons he broke his contract with the Detroit Lions. He violated the "reserve clause," long established in baseball and now a standard provision of contracts of member clubs of National. Shortly stated, the reserve clause in a player's contract ties the player to his club and he cannot go to another club without the consent of the club holding his contract. Violation of the clause results in a five year suspension which Radovich received when he joined the Dons.

Radovich, perhaps with a prescience that anticipated United States v. International Boxing Club, 348 U.S. 236, filed suit in the U. S. District Court for the Northern District of California against the National Football League and others. He alleges a violation of the Federal anti-trust statutes. He says his troubles are due to the defendants' violations. Carefully it is pleaded that professional football, in reality, is played on a stage or arena from which interstate broadcasting and telecasting originate; that the game is a business, the show of which is really inter-related with television and radio broadcasting. He says the latter are not mere incidents to the show. Then he asked for treble damages and for injunctive relief.

The League and other defendants, in their answer, say:

1. They haven't conspired against Radovich and they haven't hurt him.

2. Radovich at 35 is just an old man in his profession and no longer employable by major teams. (The poignancy of that, if true, is obvious.) So, they suggest he has gone into the business of litigation.

3. The business of professional football is dependent on having teams of reasonably comparable strength. The reserve clause which keeps players from being free agents prevents the players from going into the market place seeking annual bidders. Prevention of this tends to prevent the strong from becoming stronger and the weak weaker.

4. The whole thing in professional football is the "game": the spectacle on the field which the crowd sees. The television and radio aspects are trifling.

Pursuant to stipulation of the parties, defendants' motion to dismiss was held under advisement until the decision in Toolson v. New York Yankees, 346 U.S. 356, was announced. Then the complaint was dismissed by the district judge. Radovich appeals.

The League relies on Toolson and its parent, Federal Baseball Club v. National League, 259 U.S. 200. Radovich says the International Boxing case governs and his complaint should not have been dismissed. Which of the two tides catches professional football? We confess that the strength of the pull of both cases is about equal.

Federal Baseball v. National League survived in Toolson, we believe, only because of the historical indulgence of the Congress in not specifically bringing the sport under the anti-trust acts for 30 years after the former decision was announced. Radovich says United States v. International Boxing means that only the professional sport of baseball is left with an immunity from the application of the Sherman and Clayton Acts and that the immunity of baseball is really a historical accident. It is a good argument.

However, no one has suggested that the difference between Toolson and International Boxing lies in the fact that it is probably the public belief that professional baseball has kept a cleaner house than professional boxing. (No slur on many, many fine men in the boxing profession is intended.) To us it seems that, caught in between the commands of the two cases, we should determine our ruling by the answer to the query: Is professional football business or sport more like the business of boxing or like the business of baseball?

If our first step is correct: that we have the right to compare, then the second one is obvious. Football is a team sport. Its operation has just about the same aspects as baseball. Boxing is an individual sport. In professional football, very good arguments do exist for the indulgence of restraints on individual players. Of course, such indulgence could not stand against the positive commands of the Congress. In

boxing; arguments for restraints on the individual's right to contract seem rather hollow.

Further, it appears reasonable to us to assume that if Congresssional indulgence extended to and saved baseball from regulation, then the indulgence extended to other team sports.

Further, even though International Boxing governs here, we are confident plaintiff has not stated a claim. As said in Fedderson v. Ward, 10 Cir., 180 F.2d 519 at 522, "A general allegation * * * is not enough. While detail is not necessary, it is essential that the complaint allege facts from which it can be determined as a matter of law that by reason of intent, tendency or the inherent nature of the contemplated acts, the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce."

Distilled, plaintiff's allegation is really that there was a conspiracy to eliminate football leagues not affiliated with National, particularly another league called the All America Conference. The alleged methods would be control of players by the reserve clause and blacklists. (It seems doubtful that restraint on Radovich and others so situated is a restraint on interstate commerce.)

And if he is to recover at all, it is more probable his must be a derivative right springing from the allegations of intent to "boycott and ruin the All America Conference." Within the four corners of the com-

plaint, we doubt that the alleged means, restraint by the reserve clause and its enforcement, is legally sufficient to support, without more, a conclusion that these means were calculated to prejudice the public or unreasonably restrain interstate commerce. According to Radovich, he in fact was able to play for the All America Conference team and at a higher salary. He alleges that he couldn't play for National League teams any longer.

We fail to discover any basis to say that the appellant has pleaded that All America or any other league was ruined, would be ruined or substantially affected by the complained of acts. The result cannot be presumed as a matter of law. In International there was alleged a collection of overt acts, which if true, lead easily to the conclusion (if boxing be commerce among the states) that the public was adversely affected. There it easily flows from the allegations that a top-flight boxer could not obtain top-flight matches if he did not let International "own his soul." Effect on the public interest there requires no searching or speculation.

Judgment affirmed.

(Endorsed:) Opinion. Filed Mar. 27, 1956.
Paul P. O'Brien, Clerk.

Appendix B

United States Court of Appeals
for the Ninth Circuit

William Radovich, Appellant, vs. National Football League, et al., Appellees.	No. 14,394

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the Appellees and against the Appellant.

It Is Further Ordered and adjudged by this Court that the Appellees recover against the Appellant for

their costs herein expended and have execution therefor.

(Endorsed) Judgment

Filed and Entered: March 27, 1956
Paul P. O'Brien, Clerk.

Appendix C

Section 1, Sherman Act

July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; 15 U.S. Code, Sec. 1.

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be llegal * * *

Section 2, Sherman Act

July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; 15 U.S. Code, Sec. 2.

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4, Clayton Act

Oct. 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; 15 U.S. Code, Sec. 26.

Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in

which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. 94

WILLIAM RADOVICH,

Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE, BERT BELL, J. RUFUS KLAWANS, BOSTON YANKS, NEW YORK RANGERS, NEW YORK GIANTS CLUB, PHILADELPHIA EAGLES, THE LOS ANGELES RAMS FOOTBALL CLUB, INC., PITTSBURGH STEELERS FOOTBALL CLUB, WASHINGTON REDSKINS, CHICAGO BEARS FOOTBALL CLUB, INC., CHICAGO CARDINALS FOOTBALL CLUB, DETROIT LIONS FOOTBALL CLUB, GREEN BAY PACKERS, SAN FRANCISCO CLIPPERS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 94

WILLIAM RADOVICH, *Petitioner,*

vs.

NATIONAL FOOTBALL LEAGUE, BERT BELL, J. RUFUS KLAWANS, BOSTON YANKS, NEW YORK RANGERS, NEW YORK GIANTS CLUB, PHILADELPHIA EAGLES, THE LOS ANGELES RAMS FOOTBALL CLUB, INC., PITTSBURGH STEELERS FOOTBALL CLUB, WASHINGTON REDSKINS, CHICAGO BEARS FOOTBALL CLUB, INC., CHICAGO CARDINALS FOOTBALL CLUB, DETROIT LIONS FOOTBALL CLUB, GREEN BAY PACKERS, SAN FRANCISCO CLIPPERS, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

I.

OPINIONS AND JUDGMENTS IN THE COURTS BELOW.

The Order of the District Court was filed April 30, 1954 (R. 64).

The Judgment of the District Court was entered September 17, 1954 (R. 69). Neither have been reported.

The Judgment of the Court of Appeals was entered March 27, 1956 (R. 77). The Opinion of the United States Court of Appeals for the Ninth Circuit was filed March 27, 1956 (R. 73), 231 Fed. 2d 620.

This Court granted petition for certiorari October 8, 1956 (R. 78).

II.

JURISDICTIONAL STATEMENT AND STATUTES INVOLVED.

(a) Statutes giving jurisdiction.

Plaintiff asserts that the defendants are in violation of the antitrust laws.

Sherman Act, Section 1, July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209, 15 U. S. Code, Sec. 1:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . ."

Section 2, Sherman Act, July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209, 15 U. S. Code, Sec. 2:

> "Section 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be

deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Petitioner brings his action under Section 4 of the Clayton Act. October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731, 15 U. S. Code, Sec. 15:

"Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of plaintiff's complaint under said laws by the District Court was entered on March 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 and 2101(c).

The statutes involved are set forth above.

III.

QUESTIONS PRESENTED.

1. Whether a combination of football clubs, corporations and partnerships, an association composed of said corporations and certain individuals alleged

to have perpetrated a boycott against petitioner which prevented him from playing or coaching football with the National Football League and others are exempt from the application of the Sherman Antitrust Act because football is a team sport?

2. Whether a complaint for injuries by a private party under Section 4 of the Clayton Act is sufficient if it states violations of the antitrust laws and injury thereby?

IV.

STATEMENT OF THE CASE.

Petitioner's complaint was filed under Section 4 of the Clayton Act, set forth above, against the National Football League, ten member clubs located in various cities in the United States, and two individuals alleged to be the Commissioners of the National Football League and the Pacific Coast League; and the San Francisco Clippers of the latter (R. 5-6).

It is alleged that the respondents through their association in the National Football League have monopolized, attempted to monopolize and contracted and conspired to monopolize, control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States (R. 9). These respondents, it is alleged, agreed to adopt a uniform player's contract. It contained clauses which "prevents a player from ever playing for any team other than his original employer unless the employer consents" (R. 10, 16). It is alleged

that these clubs, further, enforced these agreed upon player's contracts by agreeing that no club in the National League would hire a player who attempted to become in effect, a free agent, by violating the reserve clause (R. 10).

It is alleged that the respondents boycotted petitioner and prevented him from becoming a player-coach with the Pacific Coast League after he had played for a competitive football conference, the All America Conference (R. 14, 15). It is alleged that part of the agreement of these clubs was to boycott, and if possible, ruin the All America Conference so that the business of organized football would remain the monopoly of the National League (R. 14, 16). The complaint specifies that the petitioner was offered a job as a player-coach at the start of the 1948 season by William Howard, coach of the San Francisco Clippers of the Pacific Coast League, but that said job was refused after the National Football League sent blacklists throughout the country, blacklisting petitioner, and after having threatened severe penalties against the Pacific Coast League if it hired or employed petitioner (R. 15).

The complaint specified that petitioner was compelled by reason of the health of his father, who lived in Los Angeles, to play football in Los Angeles in order to be near him. Because of this, petitioner alleged he requested to play with a member of the National Football League, the Los Angeles Rams, in Los Angeles, but that this request was refused by the holder of his contract, Fred Mandel of the Detroit

Lions (R. 12-13). Petitioner then accepted an offer to play for the Los Angeles Dons, of the All America Conference (R. 12-15). After playing for this competitive football league, the blacklist and boycott and ban was alleged to have occurred (R. 15).

It is alleged that by reason of the violations of the antitrust laws, respondents eliminated petitioner from the game of organized football, suppressed competition, monopolized the business of organized football; eliminated competition among themselves, prevented new competition, sought to impair the competition of the All America Conference, and have placed football players in a condition of bondage (R. 16).

It is specifically alleged that the respondents did the things they agreed to do, as set forth (R. 10).

The allegations as to interstate commerce are set forth at R. 7-9. There it is alleged that the respondents arrange for the multistate transmission of football contests by television and broadcasting companies. Other factors of interstate commerce appear in the complaint. It is alleged that each of the ten members of the National Football League contributes $50,000 to it upon membership (R. 5); that football games are played throughout the United States, and that there is constant and continuous travel by the ball players and the managers between various cities in the United States (R. 7-8); that each team adopts uniform nationwide contracts which apply to all football players under their control (R. 10, 16).

The allegations of the respondents as to interstate commerce are in the cast and mold of *Federal Base-*

ball Club v. National League, 259 U. S. 200 (R. 24-28, 53). They aid the pleadings of the petitioner in admitting that they agree and enforce a uniform player's contract (R. 28-30, 33, 35, 54); that they agree to provide for a suspension for five years of any player who attempts to become a free agent (R. 30); that pursuant to National Football League Rules, petitioner was placed on an ineligible list for five years (R. 35); and that the All America Conference was in existence and attempting to set up a competitive conference operating in the cities of New York, Chicago, Los Angeles, San Francisco, Cleveland, Buffalo, Baltimore, Brooklyn and Miami (R. 45-46).

Respondents operated in New York, Philadelphia, Los Angeles, Pittsburgh, Washington, D.C., Chicago, Detroit and Green Bay, Wisconsin (R. 5-6, 21-23).

On motion to dismiss the complaint in the District Court by the respondents (R. 63), the District Court dismissed the complaint (R. 64), and entered judgment (R. 69). The basis for the dismissal was *Toolson v. New York Yankees,* 346 U. S. 356, and *Federal Baseball Club v. National League,* 259 U. S. 200. The judgment of the District Court was affirmed by the United States Court of Appeals for the Ninth Circuit (R. 77). It held that football is a team sport as is baseball and therefore reasonably entitled to exemption from the antitrust laws. It further concluded the complaint failed to establish that the public was adversely affected by its allegations. The decision did not purport to determine if the complaint alleged violations of the antitrust laws (R. 73-77).

V.

SUMMARY OF THE ARGUMENT.

Petitioner has stated a cause of action under the antitrust laws. Section 4 of the Clayton Act requires that a private party plead only that he be injured in his business or property by reasons of anything forbidden in the antitrust laws. Accordingly all that petitioner need allege is (1) a violation of the antitrust laws and (2) injury arising therefrom. A group boycott and ban are illegal per se. *Times Picayune Publishing Co. v. United States,* 345 U. S. 594 (1953) at 625.

There is a distinct and different purpose exercised by Congress in the enactment of Section 4 of the Clayton Act, originally Section 7 of the Sherman Act,[1] from the enactments of Section 1 and 2 of the Sherman Act. Section 4 was legislated to prevent personal injury. The private antitrust action thus is not a derivative action but a direct and primary action under which conduct forbidden by the antitrust laws is made redressable as far as Congressional power extends under the commerce clause. *City of Atlanta v. Chattanooga Pipe and Foundry Co.* (6th Cir., 1903) 127 Fed. 23, aff'd 203 U. S. 390 (1906). *U. S.*

---

[1]Sec. 7 of the Sherman Act was repealed by Public Law 137, 84th Congress, 1st Session, effective January, 1956. It read as follows: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

v. Addyston Pipe and Steel Co. (6th Cir., 1899) 85 Fed. 271, aff'd 175 U. S. 211 (1899). The only judi ial limitation which may be placed on Section 4 of the Clayton Act, aside from the allegation of forbidden conduct, on a motion to dismiss is whether or not personal injury is cognizable under the complaint. That is not in issue here. In issue here is whether the complaint alleges conduct exempt from the antitrust laws and whether the complaint should set forth matters which show an adverse effect on the public, other than that pleaded.

That the activities of the respondents are not exempt from the antitrust laws is settled in *United States v. International Boxing Club of New York, Inc.*, 348 U. S. 236 (1955); *United States v. Schubert*, 348 U. S. 222 (1955). There it was held that conduct forbidden in the antitrust laws would not be immune though pertaining to athletic contests.

The only judicial limitations on Congress' enactment of the antitrust laws under the commerce power in the general welfare are (1) whether the activities involved are within the reach of Congress' power and (2) whether the conduct or matters alleged are within Congress' purpose as condemned conduct. On the showing of these conditions to his personal injury, the private party has pleaded a cause of action without more. *Mandeville Island Farms, Inc., v. American Crystal Sugar Co.*, 334 U. S. 219 (1948). The public is *ipso facto* harmed on the showing of conduct forbidden in Congress' regulation of the channels of interstate trade and commerce.

The relationship of the petitioner and respondents to interstate trade and commerce is such that his complaint comes directly within the decisions of this Court which have applied Congressional power in private actions, as follows: (1) those made a victim of conduct forbidden by the antitrust laws by an interstate business using the forbidden means are protected by the act. *Moore v. Meads Fine Bread Co.*, 348 U. S. 115 (1955); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927); *Mandeville Island Farms, Inc., v. American Crystal Sugar Co.*, 334 U. S. 219 (1948); (2) the oppression of those who contract in or engage in interstate trade or commerce by an interstate association directly affects interstate trade and commerce by the elimination of the contracts and services offered in interstate trade and commerce. *Binderup v. Pathe Exchange*, 263 U. S. 291 (1923); *Mandeville Island Farms, Inc., v. American Crystal Sugar Co.*, supra; (3) the oppression of a private party pursuant to purposes and aims to eliminate competition in interstate commerce when the direct effect of the activities of the interstate business is to eliminate the private party from association with the alleged competitors who are engaged in interstate commerce directly affects such commerce and raises a cause of action. *Ramsey v. Associated Bill Posters Ass'n*, 260 U. S. 501 (1923); (4) employees are protected against a combination of employers who engage in activities which are part of interstate commerce who seek to blacklist or boycott them. *Anderson v. Shipowners Ass'n of the Pacific*, 272 U. S. 359 (1926); (5) those

who offer services are protected in their right to engage in their gainful occupation under the antitrust laws when sought to be defeated by those in interstate trade and commerce or whose activities affect such trade and commerce. *Gardella v. Chandler* (2nd Cir., 1949), 172 Fed. 2d 402; *Mandeville Island Farms, Inc., v. American Crystal Sugar Co., Inc.*, supra. And see *United States v. National Ass'n of Real Estate Boards*, 339 U. S. 485 (1950); *United States v. Women's Sportswear Mfgrs. Association*, 336 U. S. 460 (1949). The antitrust laws enable the private party to sue for contracts and combinations void at common law and obtain affirmative relief. *U. S. v. Addyston Pipe and Steel Co.* (6th Cir., 1899), 85 Fed. 271; aff'd 175 U. S. 211 (1899); *City of Atlanta v. Chattanooga Pipe and Foundry Co.* (6th Cir., 1903), 127 Fed. 23, aff'd 203 U. S. 390 (1906).

Petitioner's complaint is readily within the antitrust laws. Under his allegations of respondents' attempted domination and control of football, ruination of the All America Conference, and elimination of competition, petitioner has raised his action in the context of a general and overall destruction of competition in the football business. But he need not stop here for his personal sufferings cognizable by reason of the boycott and ban exercised against him and others engaged in interstate trade and commerce are matters well within Congressional power and purpose as determined by the courts. *Moore v. Meads Fine Bread Co.*, supra. Thus the following acts forbidden by the antitrust laws have been pleaded to petitioner's personal suffering: (i) the circulation of

blacklists designed to prevent the employment of petitioner with members of the Pacific Coast League and members of the National Football League who are engaged in interstate commerce; *Eastern States Retail Lumber Dealer's Ass'n et al., v. United States,* 234 U. S. 600 (1914); (ii) the effectuation of a group boycott and ban designed to eliminate petitioner's association with the interstate business of football, and to oppress and ruin his offering of interstate services. *United States v. Frankfort Distilleries, Inc.,* 324 U. S. 293 (1945); *Fashion Originators' Guild v. F. T. C.,* 312 U. S. 457 (1941). The placing of boycotts and bans in the market by those engaged in interstate commerce *ipso facto* burdens interstate trade and defeats Congressional purpose; (iii) the surrender of all individual competition into an association, the National Football League, which regulates employment conditions, and pursuant thereto, blacklists, boycotts and bans players and prevents their rendering their occupation. *Anderson v. Shipowners Ass'n of the Pacific,* 272 U. S. 359 (1926); (iv) The entry into a concerted nationwide plan to oppress petitioner, and subject his business to ruin. *Binderup v. Pathe Exchange,* 263 U. S. 291 (1923); *Fashion Originators' Guild v. F. T. C.,* supra; *United States v. International Boxing Club of N. Y., Inc.,* supra, concerned the denial of free entry to boxers and promoters in the boxing business.

To immunize the injury to petitioner from conduct in violation of the antitrust laws, on a motion to dismiss, is beyond the pronouncements of this Court.

Hart v. B. F. Keith Vaudeville Exch., 262 U. S. 271 (1923); *Binderup v. Pathe Exchange*, supra; *Mandeville Island Farms, Inc., v. American Crystal Sugar Co.*, supra.

VI.

ARGUMENT.

I.

PETITIONER HAS ALLEGED THE PERPETRATION OF CONDUCT CONDEMNED BY CONGRESS TO HIS INJURY.

A. The complaint alleges that the respondents are in interstate commerce, and they have been refused an exemption from antitrust liability from Congress.

Petitioner urges that the decisions in the cases of *U. S. v. International Boxing Club of New York, Inc.*, 348 U. S. 236 (1955), and *U. S. v. Schubert*, 348 U. S. 222 (1955), leave no room for argument that the activities of organized professional football are within the scope of the Sherman Act. The Court below sought to find a distinction between "team sports" and non team sports. But the basis of the decision in the above cases rests not on the type of athletic activity involved, but upon the sound judicial doctrine that the courts cannot exempt business from the exercise of Congress' power in the Sherman Act.

The same considerations which led the Court to refuse to grant boxing an immunity from antitrust prosecution are applicable to the business of football. (1) At the time the complaint in this case was filed, no court had ever held that football was not subject to the antitrust laws. (2) The case of *Hart v. B. F. Keith Vaudeville Exchange*, 262 U. S. 271 (1923),

established that all businesses using interstate facilities would have their activities subject to a hearing on the merits. The *Hart* case has even more significance to this proceeding than the *Boxing* case. For the case was a private action under the antitrust laws, and came to the court on a motion to dismiss. The clear command of Justice Holmes in that case was that no complaint alleging federal jurisdiction should be dismissed under the Sherman Act involving more than frivolous contentions on the grounds of insufficiency of interstate commerce. This decision then was a clear indication to the athletic world that its activities affecting private parties would be subject to a trial on the merits. (3) Congress specifically failed to allow the immunity from antitrust prosecution to football that the Court below seemed to grant. As is stated by the Court in the *International Boxing Club* case, Congress had before it four bills forbidding the application of the antitrust laws "to organized professional sports enterprises or to acts in the conduct of such enterprises" (H.R. 4229, 4230, 4231, and S. 1526, 82d Cong., 2d Sess.) Congress specifically refused to grant football the immunity it has now seemingly been granted. Petitioner urges, it is for Congress and not the courts to grant immunity from antitrust prosecution, and Congress has refused to grant the exemption. This Court has repeatedly admonished this principle, and the decision of the Court below is, it is respectfully submitted, a clear departure from the commands of the Court. *U. S. v. South-Eastern Underwriters Ass'n*, 322 U. S. 533 (1944).

The allegation of the petitioner's complaint certainly raises the jurisdiction of the federal courts over the activities of the business of football. *Hart v. B. F. Keith Vaudeville Exch.*, supra. It is alleged that respondents receive substantial remuneration for interstate broadcasting and televising; that prior to the opening of the football season the various agents of the defendant clubs make contracts with interstate communication media; that these are mutual arrangements by which each club contributes its share to a common venture; that at said time it is agreed and contemplated that the contest of football will include interstate transmission, and that apparatus for interstate transmission will be installed in the ball parks (R. 7-9).

Further, the elements of the uniform adoption of contracts by ten club owners located in ten different cities in the United States, the leasing of ball parks, and the traveling of players and equipment across state lines mark the business of football an interstate business. The National Football League itself is an interstate governing body which received $50,000 from each member located in varying parts of the United States (R. 5). Its rules and regulations are adopted by each club and thus have nationwide application stretching from California to New York (R. 5, 15, 20, 24, 27-28, 35). *United States v. South-Eastern Underwriter's Ass'n*, 322 U. S. 533 (1944); *United States v. Schubert*, supra.

B. The private right of recovery under the antitrust laws is a direct and primary right under which the private party may reach any conduct forbidden by the antitrust laws, as far as Congressional power extends, which has caused injury.

The court below based its decision on two grounds: (1) that it could distill the action of the petitioner into a "derivative right springing from allegations of intent" to "boycott and ruin the All America Conference" (R. 76); and (2) that the matters alleged by petitioner did not show that the "public was adversely affected" (R. 77). As to the first contention, a complaint may not be dismissed if under any state of facts which could be used in support of the claims pleaded, plaintiff would be entitled to relief. *Dutton Co. v. Cities Service Defense Corp.* (8th Cir., 1952), 197 Fed. 2d 458; *J. Walker and Sons v. Tampa Cigar Co.* (5th Cir., 1952), 197 Fed. 2d 72. The complaint is replete with facts which can have no other conceivable effect than that those engaged in interstate business have injured petitioner within the scope of the antitrust laws.

The complaint of petitioner may not be distilled by the court on a motion to dismiss. Every element and statement in the complaint must be supported. The absence of evidential facts does not prevent the party from proving matters which the complaint has generally charged. This is in the spirit of the rules of the Federal Rules of Civil Procedure and the command of this Court. *U. S. v. Employers Plasterers' Association,* 347 U. S. 186, 188 (1954).

> "Whether these charges be called 'allegations of fact' or 'mere conclusions of the pleader' we

hold that they must be taken into account in deciding whether the Government is entitled to have its case tried."

And at 189:

"And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified."

As to the second contention, that of showing an "adverse public effect" — it is respectfully submitted that the Court below has confused doctrines which relate only to the extent of Congress' power and purposes under the antitrust laws and applied them in a manner not permissible under Section 4 of the Clayton Act. This act, on its face, is not concerned with public harm, but with private injury. There can be no judicial limitations on this section, on a motion to dismiss, apart from the alleging of conduct forbidden by the antitrust laws, other than that personal injury be cognizable in the complaint.

The judiciary by the enactment of the antitrust laws is concerned only with the enforcement of them. This in turn calls for the determination of whether or not the conduct before it is within the reach of Congress under the commerce clause and whether Congress manifested a purpose to condemn it. The doctrine of "adverse public effect" seems to state that the Court is concerned with determining the public effect of conduct even if it violates the antitrust laws. For the Court below did not discuss the allegations of petitioner's complaint which specified illegality under

the antitrust laws. The source of this doctrine is clear, but it is erroneous and has no direct support from this Court. It arises from the discussions of this Court under its interpretation of the commerce clause. Because of the strictness of the early cases construing Congressional power, *United States v. E. C. Knight,* 156 U. S. 1 (1895), the law began to extend Congressional power under the commerce clause by speaking in terms of the "effect" of activities on interstate commerce, as discussed in *Mandeville Island Farms, Inc., v. American Crystal Sugar Co.,* supra. This raised the issue of direct, and later the substantial affect of conduct on interstate commerce. This Court in such discussions thus spoke in the terms of the effect of forbidden conduct in order to sustain manifest Congressional power. *Fedderson Motors, Inc., v. Ward* (10th Cir., 1950), 180 Fed. 2d 519, and the Court below thus erroneously applied this concept which related only to Congressional power to determine the nature of a private antitrust action. Thus it is said that the private action is a derivative action from public harm and not a direct action for personal injuries because the forbidden conduct must affect, not interstate commerce, but the public. This was thought to be fortified by considering the government's action under the antitrust laws which in general, but not of necessity, raises issues of public protection. From this it was said that the private party must allege matters of similar public harm. Yet the pleading of public harm by the government pleader depended solely on the drafter since all that the government need prove is a violation of the

antitrust laws and Congressional power to reach it. Congress, moreover, had distinct and different purposes in enacting Section 4 of the Clayton Act from actions to be enforced by the government. Congress concern in the enactment of the private right of recovery was with personal injury and oppression of the individual. This is told in the Senate debates regarding the enactment of the Sherman Act (20 and 21 Cong. Record Senate Bill No. 3445 (1889); Senate Bill No. 1 (1890)). In Sections 1 and 2 of the Sherman Act the Congress was concerned with the defeat of the public welfare by conduct which threatened to restrain trade and cause personal sufferance. This is not to say, however, that the government action and the private action do not manifest a Congressional purpose to leave no stone unturned in its elimination of forbidden conduct as far as its power extended. For as this Court has held the private action is a part of Congress' antitrust enforcement program. *Lawlor v. National Screen Service,* 349 U. S. 322 (1955). In attempting to stamp out any abuse of the free economy, Congress allowed private actions to be brought, which because of the requirements of private injury, would consequently involve not matters of public protection, but simply matters of personal suffering and injury from conduct forbidden in the antitrust laws. The general welfare was necessarily involved upon the showing of conduct forbidden by Congress and injury therefrom. And now that Congress' full power under the antitrust laws has been determined by this Court to reach injury resulting solely from an interstate combination

using outlawed practices, *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, the question of effect of forbidden conduct on interstate commerce is to be treated in terms of the fact that forbidden conduct has been perpetrated by an interstate business. As such, the question of public harm as used below must be reduced, then, not to a question of Congress' power under the commerce clause, but to an attempt to immunize forbidden conduct from personal injury. But this in turn allows judicial opinion to supplement that which Congress has already legislated. For public injury must occur in the participation in conduct condemned by Congress as harmful to the public. This rests on the historic difference between the function of legislation and the function of judicial enforcement of Constitutional enactments.

In *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, the Court stated at 119:

> "We think the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies are kept high while the local prices are lowered. If this method of

competition were approved, the pattern for growth of a monopoly would be simple."

The group boycott is illegal per se. *Times Picayune Publishing Co. v. United States,* 345 U.S. 594 (1953), at 625. See also *United States v. Frankfort Distilleries,* 324 U.S. 293 (1945); *Fashion Originators' Guild v. F. T. C.,* 312 U.S. 457 (1941); *Eastern States Retail Lumber Ass'n v. United States,* 234 U.S. 600 (1914) (Blacklists circulated to induce marketing arrangements held unlawful).

Consequently confederates in a boycott and ban are engaging in outlawed competitive practices and if they be interstate businesses they are within the scope of the Sherman Act. This is so even though the forbidden practices be directed against a local merchant and no interstate transactions are used to destroy him. The fact that petitioner here is not a competitor in the strict sense but one whose job opportunities were dependent on observation by respondents of the antitrust laws is not significant. *Roseland v. Phister,* (7th Cir., 1942), 125 Fed 2d 417. He has been oppressed within the meaning and intention of the antitrust laws. Manifestly if this Court was concerned with the effect of the Moore Bread Co.'s conduct on the public it would have been forced to find little or no effect. For it was concerned only with the sale of bread in Santa Rosa, New Mexico, and, at that, the defendant was offering a lower price for its bread as a result of the forbidden conduct. Thus the Court has recently all but eliminated any judicial concern for the effect of conduct on interstate commerce, and

has held that conduct forbidden by the antitrust laws and engaged in by an interstate business is actionable by a private party even though the conduct be retaliatory.

So it is that petitioner's action is a direct and primary right to recover damages for his personal injury from those who engage in conduct forbidden by the antitrust laws. He need allege only two matters to support his action; (1) a violation of the antitrust laws and (2) injury arising from the violation.

Section 4 of the Clayton Act states:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . ."

On its face the section calls for the prima facie right of action only if a person shall be injured by reason of anything forbidden in the antitrust laws. As was stated by Senator Sherman, 21 Cong. Record, Part III, 2456:

> "These two sections are *distinct* and *different* in their *scope* and *object*. The first invokes the power of the national government, in proper cases, to restrain such a combination by mandatory proceedings from interfering with trade and commerce of the country, and the second section is to give private parties a remedy *for personal injury* caused by such a combination."[1] (Emphasis added).

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[1]At this time Senator Sherman was speaking of the first draft of Senate Bill No. 1, introduced December 5, 1889. Section 2 then provided for private right of action and double damages.

The act accordingly was soon interpreted by the Courts to declare a direct and primary right to the private party not dependent on any public injury. If harm befell the individual from a violation of the law, his right to sue was enforced.

In 1907 the 3d circuit stated in *Wheeler Stenzel Co. v. Nat'l Window Glass Jobbers Ass'n,* 152 Fed. 864, 874, to wit:

> "It is manifestly the correct understanding of the seventh section of the act that where a man is harmed in his business or property by a violation of the act, he has suffered a legal injury and is entitled to his action therefor."

And the First Circuit in *Albert Peck Barth Co. v. Mitchell Woodbury Corp.,* 57 Fed. 2d 96, in 1932 stated:

> "To constitute an offense under Section 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate commerce, to show the public was affected and to what extent."

And in *Monarch Tobacco Works v. American Tobacco Co.,* the Circuit Court in Kentucky stated in 1908, 165 Fed. 774, 777:

> "All that is necessary to support the action is that business or property of the complainant shall have been in some way injured by reason of the illegal scheme."

The Court in *City of Atlanta v. Chattanooga Pipe and Foundry Co.,* (6th Cir., 1903), 127 Fed. 23, aff'd 203 U.S. 390 (1906), has set forth perhaps the most

cogent interpretation of Section 4 of the Clayton Act, then embodied as Section 7 of the Sherman Act. At 127 Fed. 23, 27 the Court stated:

> "That such a plaintiff is entitled to recover the damages thus sustained in his business, whatever its character, would seem to be the plain purpose of the seventh section of the law of Congress, under the logic of the decision in Addyston Pipe Co. v. United States. It is possible to so construe this seventh section as to devitalize this section by confining compensatory relief to such persons as shall sustain an injury in some interstate business whose volume or profit has been diminished. But this construction does not seem consistent with the wide economic purposes of Congress, as manifested by the whole tenor of the act. Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of the law. The act gives the remedy to 'any person' 'injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act.' If Congress had the power to declare unlawful a combination which was intended to restrain interstate commerce by enhancing the value of a commodity when the subject of interstate commerce, it had the power to give a compensatory remedy to any person directly affected by the unlawful agreement."

And at 28-29, the Court stated:

> ". . . The seventh section alone gives any remedy to one injured by such a forbidden combination

or contract, and that measures the relief by the 'damages by him sustained,' costs of suit, and his reasonable attorney's fees. The remedy is not given to the public, for no one may bring the action save the person 'who shall be injured,' etc., and the recovery is for the sole benefit of the person so injured and suing."

Justice Holmes in *City of Atlanta v. Chattanooga Pipe and Foundry Co.*, 203 U.S. 390 (1906), 397 said:

"In other words, if Congress had the power to make acts illegal, it could authorize recovery for damages, although the latter was suffered wholly within the boundaries of one state."

Private antitrust action always raises a public harm as long as it is concerned with matters forbidden by Congress and personal injury. The public interest in personal injury is the concern of Congress and not the judiciary.

C. The complaint sets forth matters forbidden by Congress to petitioner's injury which raise the powers and purposes of the Congress.

1. Allegations of monopolization by respondents and the ruination of competitive leagues effecting boycotting and ban raise a cause of action to one who is so injured as part of the illegal plan.

Petitioner's complaint may not be distilled on a motion to dismiss and it is submitted that the petitioner has pleaded sufficient facts from which it can be proved that he was injured by the respondents from acts connected with their illegal attempt to monopolize the football industry, destroy competition and ruin competitive leagues (R. 9, 14, 16). It cannot be assumed or argued that respondents have acted

in a manner inconsistent with this purpose. The complaint specified that the program of the respondents was to control and monopolize the business of football (R. 9-10). Such a purpose and plan is, of course, illegal. *U. S. v. Associated Press*, 326 U.S. 1 (1945); *Fashion Originators' Guild v. F. T. C.*, 312 U. S. 457 (1941); *Paramount Famous Lasky Corporation v. U. S.*, 282 U. S. 30 (1930); *U. S. v. First National Pictures, Inc.*, 282 U. S. 44 (1930). *U. S. v. American Medical Association*, (D.C. Cir., 1942), 130 Fed. 2d 233, affirmed, 317 U. S. 519 (1943).

Mere statements of just cause or benevolent purpose cannot decide the fact of whether respondents did, in fact, have as their purpose the domination of the interstate business of football and the interstate communication of football contests. As was stated by the Circuit Court in *U. S. v. American Medical Association*, (D. C. Cir., 1942), 130 Fed. 2d 233, at 249:

> "Neither the fact that the conspiracy may be intended to promote the public welfare, or that of the industry, nor the fact that it is designed to eliminate unfair, fraudulent and unlawful practices, is sufficient to avoid penalties of the Sherman Act."

Thus respondents, it must be assumed, attempted to control an interstate business and attain monopoly over the contests which are part and parcel of interstate transmission and communication.

Whether or not the means alleged are innocent of themselves, they are unlawful if part of a plan to

monopolize. *U. S. v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948); *Schine Chain Theatres, Inc. v. U. S.*, 334 U. S. 110 (1948); *U. S. v. Griffith*, 334 U. S. 100 (1948); *U. S. v. Corn Products Refining Co.*, (S. D. N. Y. 1916), 234 Fed. 964.

Persons who are cut off from their business or trade by those attempting to monopolize interstate trade and commerce have a private cause of action under Section 4 of the Clayton Act. *Eastman Kodak Co. of N. Y. v. Southern Photo Materials Co.*, 273 U.S. 349 (1927); *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U. S. 251 (1946); *Roseland v. Phister Mfg. Co.*, (7th Cir., 1942) 125 Fed. 2d 417. See also *Greenleaf v. Brunswick-Balke-Collender Co.*, (D. C. Pa. 1947), 79 Fed. Supp. 362. (Refusal to allow billiard player participation in championship billiard contest held actionable under Section 4 of the Clayton Act).

The boycott involved in petitioner's complaint arose after petitioner had played football with the All America Conference (R. 12-14). It is alleged in the context of a purpose to ruin the All America Conference (R. 14). The boycott was imposed by threats against the Pacific Coast League (R. 15). These allegations specify activities directly affecting interstate commerce since they involve those engaged in interstate trade and commerce. When viewed as part of a plan to monopolize the football industry, the boycott and ban engaged in by respondents are clearly within the power of Congress and its condemnation. Further, *United States v. International Boxing Club of New York Inc.* necessarily decides the power of

Congress over these matters, and its purpose to allow free access in the athletic business.

It is not sufficient under the general allegations of this complaint to assume that the boycott against petitioner was applied only against him and therefore its exercise had little or no effect on interstate commerce, to use traditional interstate commerce language. For the power and purpose manifested against petitioner was a demonstration of ruthless conduct which would be exercised by respondents if anyone attempted to interfere with their alleged attempts to dominate and control the business of football. Its use put the Court on notice that the respondents were engaging in conduct consistent only with a purpose and intent to monopolize. As stated in *United States v. Swift,* 286 U. S. 106 (1932) 116:

> "... size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."

2. Allegations of injury arising from the concerted union of employers to boycott petitioner, the coercion exercised against the Pacific Coast League and the ban on petitioner's services directly affected the free flow of interstate trade and commerce and set forth a cause of action.

As a further ground for the enforcement of Congress' power under the antitrust laws, the allegations of petitioner's complaint which alleges that respondents have blacklisted and boycotted him, under a nationwide system of player regulation have raised a cause of action (R. 10, 13, 16). It is contrary to Congressional purposes that employers be allowed to

combine to fix the wages of employees and blacklist and ban them pursuant to combined action. Injury resulting from this concerted activity has been held to state a cause of action under the antitrust laws.

In *Anderson v. Shipowners Ass'n of the Pacific,* 272 U. S. 359 (1926) this Court was concerned with an association of employers engaged in the shipping business to fix the wages of seamen, assign them to particular vessels and blacklist those who did not comply with the association's rules. On a motion to dismiss a seaman's private antitrust action for alleged blacklisting, the Court held a cause of action was stated.

The Court, after citing the case of *United States v. Colgate,* 250 U. S. 300, 307 that

> "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of the rights of those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade."

stated at 363:

> "That the effect of the combination now under consideration, both as to the seamen and the owners, is precisely what this language condemns is made plain by the allegations of the bill we have just summarized."

Petitioner's injury cognizable under the complaint then must be enforced on the grounds that the boycott and ban exercised against him was pursuant to the combined exertion by respondents of nationwide

player regulations. This is admitted as to the blacklist, (R. 30, 35) where the respondents admit that pursuant to the rules of the National Football League petitioner was automatically suspended from playing football with them for five years. And apart from the fact that these penalties were imposed by a combination of separate club owners in interstate commerce, they directly affected interstate commerce by preventing petitioner from utilizing his services in the Pacific Coast League and the National Football League. They prevented member clubs from accepting his offer. The commerce power extends to services as well as goods and unreasonable restraints imposed against them are equally condemned. *United States v. National Association of Real Estate Boards,* 339 U. S. 485 (1950) at 491. Thus Congressional purposes in maintaining the free flow of interstate commerce are defeated when individuals associate themselves into a plan which prevents the entry and access of services into this flow of commerce.

So it is also that all of petitioner's relations to the interstate game of football was severed by respondents' conduct.

They have eliminated petitioner from the business of football (R. 16); and with it his contracts with the business, his interstate traveling, his participation in interstate communication. Thus petitioner has directly raised the conditions analyzed by this Court in *Binderup v. Pathe Exchange,* 263 U. S. 291 (1923). This was an action by a motion picture exhibitor and distributor against a combination of distributors who

induced his suppliers to refuse to deal with him in an effort to destroy his business. The destruction of the private party was held to *ipso facto* destroy interstate trade. At 312 the Court stated:

> "The contracts with these distributors contemplated and provided for transactions in interstate commerce. The business which was done under them—leasing, transportation, and delivery of films—was interstate commerce. The alleged purpose and direct effect of the combination and conspiracy was to put an end to these contracts and future business of the same character and 'restricts, in that regard, the liberty of the trader to engage in business' (Loewe v. Lawlor, 208 U.S. 274, 293, 28 Sup Ct. 301, 303 [52 L.Ed 488, 13 Ann.Cas 815]) and, as a necessary corollary, to restrain interstate trade and commerce in violation of the Anti-Trust Act."

3. Allegations of boycotting and ban show oppression of the private party. Such oppression is actionable under the antitrust laws since a common law boycott exercised by a combination in interstate trade and commerce is within the powers of Congress and condemned.

Petitioner here assumes that there is only involved in his complaint the mere doing of acts per se in violation of the antitrust laws which have suppressed his freedom to engage in his trade by an interstate combination. It is clear that even in this context the allegations of the boycott and ban directed at petitioner are within the scope of the Sherman Act. Congressional purpose is particularly concerned with the oppression of the individual by combinations engaged in acts forbidden by the antitrust laws. See, in this connection L. Hand's discussion in *United States*

v. Aluminum Co. of America (2nd Cir., 1945), 148 Fed. 2d 416, at 428-429. At this point the power of Congress reaches every activity engaged in by an interstate combination with this end. For the oppression of the individual and the driving out of worthy men from the industry by concerted activity is as much a concern of the antitrust laws as are agreements to fix prices. *Fashion Originators' Guild v. F. T. C.*, 312 U. S. 457 (1941), at 466. *Binderup v. Pathe Exchange*, supra. *Ramsey v. Associated Bill Posters*, 260 U. S. 501 (1923). The doing of these acts by an interstate combination *ipso facto* raises the judicial enforcement of the antitrust laws. *Moore v. Mead's Fine Bread Co.*, supra; *Gardella v. Chandler* (2nd Cir., 1949), 172 Fed. 2d 402.

It was the purpose of the antitrust act to condemn all restraints of trade known at common law and to give an affirmative action for compensation to those injured by the perpetration of such restraints. Such actions were to be brought into the federal Courts because of the accessibility of the defendants to federal process.

Thus a purpose of the antitrust laws was to allow a redress for damages from boycotts and bans which were unlawful restraints of trade at common law.

As was stated in *U. S. v. Addyston Pipe and Steel Co.*, 85 Fed. 271 (6th Cir., 1899), 279, affirmed, 175 U. S. 211:

> "Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a

civil action for damages in favor of one prejudicially affected thereby, but were simply void and were not enforced by the court. Mogul Steamship Co. v. McGregor, Gow and Co. [1892] App. Cas. 25; Horby v. Close, LR 2 Q.B. 153, Lord Campbell, C. J. in Hilton v. Eckersly, 6 El and Bl 47, 66; Hannen, J. in Ferrer v. Close, LR 4 Q.B. 602, 612. The effect of the act of 1890 is to render *such contracts unlawful in the affirmative and positive sense, and punishable as a misdemeanor, and to create a civil right of action for damages in favor of those injured thereby;* and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints." (Emphasis added).

Hilton v. Eckersly, 6 El and Bl 47, aff'd 6 El and Bl 66, cited in the *Addyston* case, supra, at 290, involved a combination of employers who attempted to control and discipline employees. This was held in restraint of trade. For additional common law treatment of boycotting and blacklisting as restraints of trade see especially *Mineral Water Bottle Exch., etc. v. Booth,* 36 Ch. D. 465 (1887); and the treatment of employer boycotts and blacklisting as contrary to the common law in the United States; *Huston v. Rentlinger,* 91 Ky. 333, 15 S.W. 867 (1891); *Mattison v. Lake Shore and M. S. Ry. Co.,* 3 Ohio Dec. 526 (1895); *Blumenthal v. Shaw,* (3rd Cir., 1897), 77 Fed. 954. See also Restatement of Contracts Sec. 515(c), Illustrations 20-22. These cases thus establish the illegality of employers in ending their independent competition to combine and conspire to blacklist, boycott and

ban employees from engaging in their occupation. They are restraints of trade and cognizable under the antitrust act. *Gardella v. Chandler*, supra, where Judge Hand stated at 408:

> "Be that as it may, whatever other conduct the Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest of these is a contract which unreasonably forbids anyone to practice his calling."

Petitioner's action is thus well within any theory of antitrust liability; whether judicial attention be focused on Congress' concern over interstate commerce or over injury to individuals. The only possibilities of judicial limitation of petitioner's action, construction of Congressional constitutional power over interstate commerce and construction of Congressional purposes, have been met. In engaging in conduct forbidden by the antitrust laws, respondents have brought the condemnation of Congress and raised a treble damage action. The opinion of the Court below, it is respectfully submitted, has immunized conduct without foundation, and in defeat of actual Congressional purposes. Respondents had the express opportunity for Congress to protect them from antitrust actions which would inevitably result when they took the law into their own hands. But Congress failed to grant the immunity.

The only manner in which those may escape the inevitable condemnation of activity in violation of

the antitrust laws which in itself restrains trade and commerce is to assert that their activity produces no matters of consequence to the public. It is this that the doctrine of "adverse public affect" really stands for. As such, the Courts have, it is respectfully submitted, entered into the realm of legislation reserved for Congress only. For the courts have no authority under the antitrust laws to determine whether or not conduct it finds forbidden by Congress should escape the consequences the act imposes. *United States v. South-Eastern Underwriters Ass'n,* 322 U. S. 533 (1943).

The doctrine of "adverse public effect" sets sail into a sea of doubt under which the Courts may apply differing notion of what each considers the public effect of conduct it must find forbidden by the antitrust act. Its vagueness and uncertainty alone show its inapplicability to judicial enforcement of the antitrust laws. Judge Taft in *United States v. Addyston Pipe and Steel Co.* (6th Cir., 1898), 85 Fed. 271 at 283-284 warned:

> "It is true that there are some cases in which the courts mistaking, as we conceive, the proper limits of relaxation of the rules for determining the unreasonableness of the restraint of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest and how much is not. The manifest danger in the administration of justice according to so shifting, vague and indetermined

standard would seem to be a strong reason against adopting it."

Petitioner has alleged a group boycott and ban which are per se forbidden by the antitrust laws. Such conduct in this complaint is manifestly cognizable under the antitrust laws. For it is alleged to be used by those engaged in interstate trade and commerce and whose activities directly affect such commerce. They are alleged in the context of a purpose of controlling the business of football. The boycott and ban, coming as it did, after petitioner had played with a competitive football league, the All America Conference is entirely consistent with such intent to dominate and control. Further, the boycott and ban employed by respondents were directly in or affected interstate commerce since they were effectuated and imposed on individual businesses in interstate commerce by an interstate association. The boycott terminated petitioner's offer of services to interstate businesses, the members of the National Football League and the San Francisco Clippers, with activities in interstate commerce and association with interstate communication media. The ban severed petitioner's connection with interstate business and with these media, and stopped the use of his services in the channels of interstate trade and commerce.

Petitioner's action is a direct and primary right arising from his personal injury. It involves the general welfare in the form of defeating forbidden conduct and redressing personal injury thereby. Re-

straints on the freedom of access and entry into athletic contests is a matter of Congressional purpose as was decided in the *Boxing* case. Granted allegations of Congressional power and allegations stating conduct forbidden by the antitrust laws, petitioner's action is well pleaded without more.

VII.

CONCLUSION.

For the foregoing reasons the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed and petitioner's action be reinstated.

Dated, San Francisco, California,
November 19, 1956

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United States

OCTOBER TERM, 1956

No. 94

WILLIAM RADOVICH,

Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE, BERT BELL, J. RUFUS KLAWANS, BOSTON YANKS, NEW YORK RANGERS, NEW YORK GIANTS CLUB, PHILADELPHIA EAGLES, THE LOS ANGELES RAMS FOOTBALL CLUB, INC., PITTSBURGH STEELERS FOOTBALL CLUB, WASHINGTON REDSKINS, CHICAGO BEARS FOOTBALL CLUB, INC., CHICAGO CARDINALS FOOTBALL CLUB, DETROIT LIONS FOOTBALL CLUB, GREEN BAY PACKERS, SAN FRANCISCO CLIPPERS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 94

WILLIAM RADOVICH,
Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE, BERT BELL, J. RUFUS KLAWANS, BOSTON YANKS, NEW YORK RANGERS, NEW YORK GIANTS CLUB, PHILADELPHIA EAGLES, THE LOS ANGELES RAMS FOOTBALL CLUB, INC., PITTSBURGH STEELERS FOOTBALL CLUB, WASHINGTON REDSKINS, CHICAGO BEARS FOOTBALL CLUB, INC., CHICAGO CARDINALS FOOTBALL CLUB, DETROIT LIONS FOOTBALL CLUB, GREEN BAY PACKERS, SAN FRANCISCO CLIPPERS, et al.,
Respondents.

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PETITIONER'S REPLY BRIEF.

I.

NEITHER THE DECISIONS OF THIS COURT, THE DOCTRINE OF STARE DECISIS, CONGRESSIONAL INTENT, NOR THE ALLEGATIONS OF THE COMPLAINT, SUPPORT THE EXTENSION OF FEDERAL BASEBALL TO ORGANIZED PROFESSIONAL FOOTBALL.

Respondents have urged on this Court the very arguments which were rejected in the *International Boxing* decision. They admit that they are not *exempt* from the application of the antitrust laws. But they urge that *Federal Baseball* (259 U. S. 200) is to be broadly interpreted so as to constitute a determination, not that football is not an interstate business, but that conduct forbidden by the antitrust laws is not to be subject to a hearing on the merits. They urge, in effect, that any complaint under the antitrust laws which concerns the "reserve clause" and its enforcement, in whole, or as part of a monopolistic plan and conspiracy in restraint of trade, must be dismissed as a matter of law.

But *International Boxing* decided the following in complete response to such assertions: (1) *Federal Baseball* is limited to the "business of baseball" (2) No business can urge reliance on *stare decisis* from *Federal Baseball* because less than a year after its decision, the Supreme Court in *Hart v. B. F. Keith Vaudeville Exchange* (262 U. S. 271) expressly established that *Federal Baseball* could not be relied on as a basis of exemption for other businesses, athletic or otherwise. (3) That Congressional intent could not support attempts to obtain immunity from judicial enforcement of the antitrust laws by those engaged in athletic businesses because Congress specifically re-

fused to pass legislation which would have resulted in such foreclosure (see *U. S. v. International Boxing Club of N. Y.*, 348 U.S. 236 at 242-245).

The basis of the decision below was simply the thought that if Congressional indulgence extended to and saved baseball it should also extend to and save all team sports (R. 76). Respondents' briefs may attempt to claim that the Court below studied the "aspects" of the games of football and baseball, (National Football Leagues' Brief, pp. 21-22 (hereinafter alternatively referred to as N. F. L., as distinguished from the Pacific Coast League, hereinafter alternatively referred to as the P. C. L.), but petitioner notes that the only basis to support the concept of Congressional indulgence, as used by the Court below, was simply that baseball and football are both team sports.

Respondents seek immunity from a conspiracy to monopolize the business of football, from a conspiracy to exclude competition, from a conspiracy to boycott, from a conspiracy to perpetuate an unreasonable restraint of trade, from a conspiracy to place players under bondage, and from a conspiracy to ruin a trader.

U. S. v. South-Eastern Underwriter's Ass'n, 322 U. S. 533, is a holding that Congress is presumed to have exercised all the power it possesses under the Commerce Clause in the antitrust laws to the result that all interstate activities must be presumed by the judiciary to be included under the antitrust laws.

International Boxing is the application of this doctrine to the respondents. (*Cf. Washington Professional Basketball Corp. v. Nat'l Basketball Association*, C. C. H. 1956 Trade Cases, 68,560; holding professional basketball subject to the antitrust laws).

International Boxing is an emphatic assertion that what is alleged by petitioner is prima facie actionable under the antitrust laws. This is noted by a comparison of the averments of the United States in the *Boxing* case, with petitioner's complaint.

International Boxing	Radovich
(348 U.S. 236, at 230-240) "by eliminating the 'leading competing promoter' of championship matches"	Agreements of National Football League and Pacific Coast League to eliminate the All America Conference (R. 14, 16).
"by acquiring the exclusive right to promote professional boxing contests in all the 'principal arenas' where championship matches can be successfully presented"	N.F.L. operates in the major cities of the United States, principally located in the eastern part of the country. The minors operate elsewhere (R. 4-6).
"by requiring each title contender to agree as a condition of fighting for the championship, that if he wins he would, for a period of three (and sometimes five) years, take part only in title contests promoted by the defendants."	The concerted adoption of a nationwide player contract which reserves a player for life and subjects him to boycott and ban (R. 10, 16). The agreement of the Pacific Coast League to enforce the reserve clause and boycott (R. 14-15).

The District Court's ruling was decided before *International Boxing* and after *Toolson*. The citation of authority by the District Court indicated that it based its decision solely on jurisdictional grounds (R. 64).

Answers and extensive pretrial discovery had been undertaken in this action under the complaint (R. 65-68). The answers of respondents denied a boycott of petitioner after an offer of employment had been extended to him by the San Francisco Clippers (R. 37-39, 55). The respondents, further, in their answers alleged that they were not conspirators but were entirely independent of the other (R. 37-39, 51, 52). Thus the Court of Appeals below was confronted not only with the complaint of the petitioner, as is the usual situation under a motion to dismiss for failure to state a claim for relief under F. R. C. P., Rule 12(b), but with bona fide answers which placed denials and admissions before the Court.

It can be seen that the respondents have placed in issue, not only the application of the reserve clause between their constituent members, but the enforcement of the reserve clause by blacklist and boycott aimed at preventing petitioner from obtaining employment with the San Francisco Clippers, a team non-competitive to the N. F. L. and asserted to be of minor status (R. 37). The end result of the respondents' plans, was not to promote competition on the playing field between members of the N. F. L. but to extend their power extra-territorially so as to prevent petitioner from playing football anywhere in the United States even to the extent of depriving him of bona fide demands for his services by a minor league (R. 14-15). The San Francisco Clippers was never included in the N. F. L. scheduling, and indeed the N. F. L. did not have a member club in San Fran-

cisco at the time the alleged boycott and ban took place (R. 5-6).

The rule applied on a motion to dismiss is that a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Moore's Federal Practice, Vol. 2, Second Edition, § 1208, p. 2245. *U. S. v. Employing Plasterer's Ass'n,* 347 U.S. 186 (1954).

The complaint of petitioner names the following parties as conspirators in violation of the antitrust laws (R. 5):

Bert Bell,
Commissioner of the N.F.L.
The constituent teams play at:
New York
Philadelphia
Los Angeles
(after 1945)
Pittsburgh
Washington, D. C.
Chicago
Detroit
Green Bay

J. Rufus Klawans,
Commissioner of the P.C.L.
The constituent teams play at (R. 5):
Salt Lake City
Los Angeles
(then to Long Beach)
San Francisco
(and see R. 51-52)

The allegations of conspiracy establish that the National Football League and the Pacific Coast League, as conspirators in restraint of trade, and as conspirators attempting to monopolize the business of football (R. 9) recognized the uniform players' contract of the National League, agreed to employ said contract which prevented the player from ever switch-

ing to constituent clubs or other leagues, and agreed to recognize each others blacklists and bans (R. 10). They agreed to control, regulate and dictate the terms upon which professional football shall be played throughout the United States (R. 9). These conspiracies and plans effected the suppression of competition, the suppression of petitioner, the elimination of competition between themselves, the prevention of competition from the All America Conference, and the placing of football players in a condition of bondage (R. 16).

It is obvious that the arguments presented by respondents that their activities are solely related to promotion of competition on the playing field are refuted by their own answers. Each respondent asserts that the Pacific Coast League and the National Football League were entirely independent of each other. The National Football League would then have no just reason to prevent petitioner from playing with the Pacific Coast League, an independent league of minor status, and unconnected with its scheduling.

So it is that respondents cannot claim or pretend to assert that petitioner's complaint does not set forth the following set of facts which on a motion to dismiss he may urge in support of his claim:

(1) Petitioner has alleged that he was injured as part of a plan to monopolize the business of football by exclusion of the All-America Conference, by the elimination of competition between the two sets of defendants and by the elimination of competition between the constituent members of each league.

The divisional affiliation of the Pacific Coast League with the N. F. L. would clearly cause the following in the business of ~~baseball~~: (a) it would give far western application to the uniform agreements of the members of the National Football League; (b) it would prevent bidding for the services of players by the members of the two leagues; (c) it would give extra-territorial sanction to the enforcement of the blacklists, boycotts and bans of the National Football League; and (d) it would cement two putative competitors to allow a greater economic power to eliminate the All America Conference.

Thus the blacklist, boycott and ban occurred to petitioner after he had played football for the All America Conference (R. 14). They involved an extra-territorial application of the rules of the National Football League into San Francisco, a city where it had no member club (R. 5-6). They prevented petitioner from obtaining a job with the San Francisco Clippers which desired his services. For petitioner to have accepted employment with the San Francisco Clippers would in no conceivable way interfere with the promotion of competition on the playing field as to either set of defendants. As to the National Football League, he would not have any inter-scheduling with them. As to the Pacific Coast League, he would

aid and help strengthen their league. It is clear why respondents denied the averments of this blacklist, boycott and ban and why they now seek to obscure the issue (N. F. L. Brief, p. 51, p. 59).

The consequences of playing with the competitive All America Conference is apparent by the unjustified and intentional plan to ruin petitioner's football career. Injury to petitioner was clearly imposed as part of the plan to fight the All America Conference by agreement to give extra territorial sanction to the rules adopted by the N. F. L. by means of divisional alliances so as to deter players from becoming free agents.

This action unmistakenly concerns a period of time when the respondents were engaged in the monopolization of the business of football and a "trade war" against the All America Conference (R. 14, 45-49). In this period of time, the football player was forced to become part of the war to destroy this Conference. In this period of time, petitioner was subject to a boycott and ban in testing the very purpose and intent to which the uniform players contract with its reserve clause were being used. Petitioner supplies the answer to the very question that respondents pose. Was the reserve clause and agreements to enforce it being used to promote competition on the playing field or was it used as a threat and economic sanction as part of a plan to monopolize the football business? When the respondents applied economic sanctions against petitioner who was offered a job with a team noncompetitive to the N. F. L., and admittedly of minor

status, their actions belie their words. Petitioner had played with the All America Conference, and this caused the application of extra-territorial sanction and enforcement to the agreed upon reserve clause system. The resultant purpose of respondents was not to promote competition on the playing field, but to destroy one who refused to be used as a means to perpetuate a conspiracy aimed at excluding a competitor.

(2) Petitioner has alleged a conspiracy to boycott in interstate commerce perpetrated by the respondents.

A contract which requires a trader to bind himself to one business for life, unlimited as to time and territory, and enforced by the sanction of agreements between constituent club owners, and potential competitors is an unreasonable restraint of trade. Petitioner has clearly alleged a conspiracy to adopt a restraint of trade on football players unreasonable as a matter of law. *U. S. v. Addyston Pipe and Steel Co.*, 85 Fed. Supp. 271, at 280-282. Respondents admit that the *Addyston* case correctly sets forth the conditions under which covenants in *partial* restraint of trade may be subject to judicial allowance of the defense of reasonableness. The covenant must be ancillary, it must be partial and it must be supported by consideration (id). A restraint imposed on a person unlimited as to time and territory is an unreasonable restraint of trade. Id, and see also *Oregon Steam Navigation Co. v. Winsor*, 87 U. S. 64 (1874).

The boycott and ban exercised against petitioner involved a third element of illegality. The respondents sought not only to use an unreasonable reserve clause

by conspiracy but also combined and conspired to place a boycott in the channels of interstate commerce. Knowing the inherent invalidity of their player restrictions, respondents applied extra-judicial means and methods of enforcement. They assumed a sovereign's prerogative. Such assumption and the surrender of potential competitors to the rules of the N. F. L. is in violation of the antitrust laws. *Fashion Originator's Guild v. F. T. C.* 312 U. S. 457 (1941); *Anderson v. Shipowner's Association of the Pacific,* 272 U. S. 359 (1926).

(3) The reserve clause structure of football is a price fixing combination which is supported by extra-territorial affiliation and lacks true consideration.

Petitioner emphasizes that the Court below conducted no factual examination into the aspects of football and baseball, but simply noted that each was a team sport.

But respondents see fit to shout into the record the conditions of baseball and request comparison with football. Petitioner asserts two basic distinctions between baseball and football: (1) affiliation between the National Football League and minor leagues has no connection to the development of player talent. These affiliations are simply agreements not to compete for territories, agreements not to vie for player talent and agreements to allow nationwide power to the economic sanctions of blacklist, boycott and ban. Baseball's major-minor league affiliation is supported by the farm system whose purpose is the development

of player talent. (2) Baseball allows free bidding upon a player's initial entry into the business. Football operates by means of a "player draft".

The purpose of affiliation between the National Football League and minor leagues cannot be related to the development of player talent. Football talent is developed by the colleges and not by minor leagues. Affiliation between football leagues which do not schedule each other then must involve agreements not to compete between potential competitors.

Alliance between potential competitors in the football business mean the existence of agreements not to compete for territories, agreements to give nationwide application to blacklist, boycott and agreements to cement group power in favor of the affiliates over outside competitors. Affiliation of the Pacific Coast League and the National Football League has not the remotest connection to the development of player talent. The structure of football is such that it is simply and openly a price fixing combination. A baseball player has a free market to enter into. There is bidding between baseball club owners for his services. The baseball bonus baby is a well known figure of the sport pages. Generally the young baseball player after free selection and free bidding, enters into a farm club of a major league baseball club, and is developed from Class League to Class League to the polished major league player.

It is true that as he develops there is no competitive bidding for his services, but the initial free market

was in his favor in that he is the subject of competitive bidding.

Football, on the other hand, places the names of college players, famous and from minor colleges, into a hat by means of a player draft. There is no free market upon the players' entry into football. He is "drafted" by one club, and the Constitution and By-Laws of respondents through the Uniform Players Contract prevents any bidding between football club owners. The football player is given no consideration to have his name placed on the "draft list". He is told by the National Football League that he must play with one team and that no other team will bid for services. He must either play with one club at the owner's price, or go to Canada. Affiliates have agreed not to compete with the N. F. L.'s draft. The agreed upon football draft does not guarantee the drafted football player, he will play football *at any salary*. He is forced to "try out" for his draftor *without salary*. Before he may try out, however, he must sign the Uniform Players Contract. He thus must sign the reserve clause contract *without consideration*. More football players are drafted than can be used in the actual championship season. The football player thus must first try out for the exhibition season *without salary*. If he makes the initial squad of players which can play for the owner, he is then forced to play all exhibition games, generally running from August to and including mid-September, *without salary*. If subsequently he is forced out of the initial drafting club when it must finally cut its team down

to 35 players after the exhibition season, he does not receive any salary for his services either for (1) placing his name on the draft list, (2) for the try-out period, (3) for the reserve clause he is forced to sign before reporting for training camp, and (4) for exhibition games. These conditions apply to more football players who do *not* play football than who do.

If the football player makes the team, he is obligated to stay with his original draftor for life by means of one year options unless waived out, or sold or traded. The owner sets his salary on exercise of the option, and the player must agree to allow the owner another option. Clearly the football player has been placed in a condition of bondage without adequate consideration to support unreasonable restraints on his occupation. The anti-trust laws condemn restraints on services as well as commodities. *U. S. v. National Ass'n of Real Estate Boards,* 339 U. S. 485 (1950). Restraints on occupation are the very base of the anti-trust laws. *U. S. v. Addyston Pipe and Steel Co.* (6th Cir., 1899), 85 Fed. 271, aff'd 175 U. S. 211 (1899). They condemn the exercise of group power to the oppression of the trader. *Mandeville Island Farms Inc. v. American Crystal Sugar Co.,* 334 U. S. 219 (1948).

(4) Petitioner has alleged a nationwide plan to oppress and ruin his business by conspiracy and combination using means forbidden by the antitrust laws.

There is not the slightest pretense by respondents to justify a boycott and ban against petitioner which prevented the San Francisco Clippers from using his

needed services. Such means are unreasonable per se. The Pacific Coast League by respondents own admissions was not a constituent member of the N. F. L. (R. 37-39, 51).

The ruination of a trader is manifestly cognizable under the antitrust laws. See Senate Debates, 21 Cong. Record as to Senate Bill No. 3445, and Senate Bill No. 1. *City of Atlanta v. Chattanooga Pipe and Foundry,* 203 U. S. 390 (1906); *Binderup v. Pathe Exchange,* 263 U. S. 291 (1923); *U. S. v. Addyston Pipe and Steel Co.,* supra.

II.

A PURPOSE OF THE ANTITRUST LAW IS TO INSURE THE FREE ENTRY OF GOODS AND SERVICES IN ANY PART OF INTERSTATE COMMERCE, IN EVERY LEVEL OF DISTRIBUTION, TO EVERY ASPECT OF A TRADE AND COMMERCE, TO EVERY TRADER AND TO EVERY FORM OF BUSINESS ORGANIZATION.

The Sherman Act insures a free economy and commands that a free market will control and regulate industry so that no group or combinations will have authority to displace the free market. Most agreements between competitors are per se in restraint of trade, discussed below, and whether or not a concert in restraint of trade is reasonable can only be determined after an extensive factual inquiry. *Standard Oil Co. of N. J. v. U. S.,* 221 U. S. 1 (1911); *Board of Trade v. U. S.,* 246 U. S. 231 (1918); *U. S. v. Addyston Pipe and Steel Co.* (6th Cir., 1899), 85 Fed. 271, aff'd 175 U. S. 211.

The term "public protection" is susceptible of two interpretations. As used in petitioner's opening brief it has been used in the sense that it is erroneous to assert that there must be alleged "substantial injury to the general public" apart from alleging a violation of the antitrust laws (Petitioner's opening brief, p. 19). In another sense the term may mean that any undue restraint on the freedom of trade violates protection to the public which a free economy insures. That the antitrust laws are concerned with public protection arising from threatened injury to the competitive system Congress seeks to maintain is not denied. But that public protection is accorded only by a decrease in the quality or quantity of a commodity or service or through an increase in prices is unsupportable (N. F. L. Brief, p. 59).

For the antitrust laws are all-comprehensive protecting all who are made victims of forbidden practices by whomever they may be perpetrated. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948).

In addition to the categories of per se restraints of trade claimed to be involved under the antitrust laws by respondents; this Court has declared that inter alia, the following are within Congressional condemnation: (1) agreements among employers to regulate the terms of employment, *Anderson v. Shipowner's Ass'n of the Pacific*, 272 U. S. 359 (1926); (2) group boycott, *Fashion Originators' Guild v. F. T. C.*, 312 U.S. 457 (1941); *Times-Picayune Pub. Co. v. U. S.*, 345 U. S. 594, 625 (1953); (3) the destruction of a trader,

Binderup v. Pathe Exchange, 263 U. S. 291 (1923); *Story Parchment v. Patterson Paper Co.*, 282 U. S. 555 (1931); *Moore v. Meads Fine Bread Co.*, 348 U. S. 115 (1955); (4) the obtaining of less than fair market value for services rendered by concerted action or monopoly power. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219 (1948); (5) the exclusion of competitors from the market, *U. S. v. International Salt Co.*, 332 U. S. 392 (1947); (5) Discrimination between customers by concert of action, *Bigelow v. R. K. O.*, 327 U. S. 251 (1946); (6) the refusal of one with substantial power to offer equal treatment, *U. S. v. Griffith*, 334 U. S. 100 (1948). See also *American Federation of Tobacco Growers v. Neal* (4th Cir., 1950), 183 F. 2d 869; *Gamco v. Providence F. and G. Co.*, (1st Cir., 1952), 194 F. 2d 484; *Greenleaf v. Brunswick-Balke-Collender Co.* (D. C. Pa. 1947), 79 Fed. Supp. 362.

To be sure, the antitrust laws are often used to strike down at combinations which involve urgent public protection, *U. S. v. Hartford Empire Co., et al.*, 323 U. S. 386 (1945), but they also strike restraints in any part of interstate commerce even though involving free access in small local areas. They apply to any part of the distributive system. *U. S. v. Lorain Journal*, 342 U. S. 143 (1951); *Indiana Farmers Guide Publ. Co. v. Prairie Farmer P. Co.*, 293 U. S. 268 (1934); *U. S. v. Women's Sportswear Mfgrs. Ass'n.* 336 U. S. 460 (1949). Petitioners assert that they are "quasi partners" and exempt from violation of the antitrust laws because it is a "reasonable" restraint of

trade to allow partners, pending a partnership, to arrange business terms (id, pp. 53-56). This assertion, of course, is contrary to the principle that competitors cannot impose restraints in an industry under the guise of common protection. *U. S. v. Associated Press*, 326 U. S. 1, *Fashion Originators' Guild v. F. T. C.*, 312 U. S. 457 (1941); *U. S. v. Masonite Corp.*, 316 U. S. 265 (1942); *Timken Roller Bearing Co. v. U. S.*, 341 U. S. 593 (1951). Good intentions, business expediency, public motives are no defense to restraints of trade imposed by combinations (id.).

The argument that the public must be adversly affected by an association of industry units, allegedly made for the purpose of mutual protection in order to sustain liability under the antitrust laws, was specifically addressed to this Court and rejected. In the *Associated Press* case, where newspaper publishers agreed to withhold its news service from competitors, the argument was made that there was no harm to the public, and hence no liability, since their newspapers covered most of the United States and the public had access to the defendants' services. This Court stated at 326 U. S. 1, p. 18:

> "We reject these contentions. The proposed indispensability test would fly in the face of the language of the Sherman Act and all of our previous interpretations of it. Moreover, it would make that law a dead letter in all fields of business, a law which Congress has consistently maintained to be an essential safeguard to the kind of private competitive business economy this country has sought to maintain".

In the *Fashion Originators' Guild* case this Court specifically rejected the arguments that the association (there designed to end style piracy), was not within the policy of the antitrust laws because it did not combine to fix prices, limit production, or bring about a deterioration in the quality of merchandise. The Court stated at 312 U. S. 457, 466-467:

> "Petitioners, however, argue that the combination cannot be contrary to the policy of the Sherman and Clayton Acts, since the Federal Trade Commission did not find that the combination fixed or regulated prices, parcelled out a limited production, or brought about a deterioration in quality. But action falling into these three categories does not exhaust the type of conduct banned by the Sherman and Clayton Acts. For as this Court has said, 'Trade or commerce under these circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to the altered surroundings. Mere reduction in price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all powerful combination of capital.' *U. S. v. Trans-Missouri Freight Assoc.*, 166 U.S. 290, 323; 17 S.Ct. 540, 552; 41 L. Ed. 1007."

III.

THE CLAYTON ACT, §6, §20 AND THE NORRIS-LaGUARDIA ACT ARE CONCERNED ONLY WITH THE RIGHTS OF LABOR TO COMBINE TO OBTAIN THEIR OBJECTIVES.

Petitioner's complaint is concerned with the monopolization of the football industry, the conspiracy effectuated by the affiliation with the National Football League and the Pacific Coast League, a group boycott and ban in the free flow of interstate commerce, the placing of football players in a condition of bondage, and a conspiracy aimed, not at terms and conditions of employment, but aimed at the complete severance and ruination of petitioner's association with the football business.

Respondents assert the applicability of statutes whose only purpose and effect is to remove the conduct of trade unions from the antitrust laws, and to protect the status of legitimate collective bargaining. *U. S. v. Hutcheson,* 312 U. S. 219, 236 (1940). It is noted that the labor law issue presented by respondents was neither raised in the Court of Appeals below or in opposition to the petitioner's writ for certiorari. Respondents should not seek to obtain the protection of these statutes under these conditions. *Morley Construction Co. v. Maryland Casualty Co.,* 300 U. S. 185 (1937).

The contentions of the respondents that the Clayton Act, and the Norris-LaGuardia Act immunize this action have been answered in *Allen Bradley Co. v. Local Union No. 3,* 325 U. S. 797, at 810.

> "Seldom, if ever, has it been claimed before that by permitting labor unions to carry on their ac-

tivities, Congress intended completely to abdicate its constitutional power to regulate interstate commerce and to empower interested business groups to shift our society from a competitive to a monopolistic society."

Thus not only have labor unions *not* been granted antitrust exemption from these sections, but employers have not been allowed to excuse their conduct on the spurious contention that the action involved employee relations. As was stated in *U. S. v. Women's Sportswear Mfgrs. Ass'n*, 336 U. S. 460, 464:

"... benefits to organized labor cannot be utilized as a cats-paw to pull employers' chestnuts out of the antitrust fires."

See *U. S. v. American Medical Association*, 317 U. S. 519 (1943), 535-536; *Columbia River Packer's Ass'n v. Hinton*, 315 U. S. 143 (1942); *U. S. v. Employing Plasterer's Ass'n*, 347 U. S. 186 (1955).

IV.

PETITIONER'S INJURY IS WELL PLEADED.

Petitioner has clearly alleged an action under the antitrust laws and has pleaded his injury and damage with particularity. *C. E. Stevens Co. v. Foster and Kleiser Co.*, 311 U. S. 255 (1940).

The plain purpose and effect of the respondents' scheme was to injure petitioner, and he has alleged his injury. Those who have violated the antitrust laws are not allowed to escape liability on the grounds that

their conduct has made damages incapable of exact ascertainment, let alone demand a dismissal of a complaint for failure to assert affirmative defenses. *Bigelow v. R. K. O.*, 327 U. S. 251 (1946); *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U. S. 555 (1931); *Eastman Kodak Co. v. Southern Photo Material Co.*, 273 U. S. 359 (1927). See also *Package Closure Corp. v. Sealright Co.*, (2nd Cir., 1944) 141 F. 2d 972.

CONCLUSION.

To summarize, the petitioner has pleaded per se violations of the antitrust laws which have been foreclosed from inquiry into the merits by the Court below in contradiction to the *International Boxing* case. Respondents argue that the promotion of competition on the playing field makes all their activities reasonable as a matter of law. But the conduct alleged by petitioner cannot be tested with such a defense.

There are alleged the following: (1) that the aim and purpose of respondents was to control and dominate the business of football; (2) that they sought to exclude a competitor; (3) that they affiliated as part of a conspiracy to bring about these objectives; (4) that they entered into an affiliation agreement which prevented petitioner from playing or coaching football with an otherwise putative competitor, the Pacific Coast League; (5) that they burdened interstate trade and commerce by boycott and ban; (6) that they perpetrated restraints on occupation unreasonable as to time and territory and enforced these re-

straints by boycott and blacklist and ban; (7) that these restraints were aimed at the exclusion of a competitor and were given nationwide application beyond the area of operation of the N. F. L.

The argument that it is desirable to present teams of equal strength can afford no justification for respondents' violation of the antitrust laws to the ultimate result of boycotting petitioner from playing or coaching football with the San Francisco Clippers, a team non-competitive to and not a constituent member of the National Football League and which desired his services.

Petitioner respectfully submits that there exists federal jurisdiction over petitioner's complaint under the antitrust laws and that the Court below erred in dismissing his action as a matter of law.

Dated, January 11, 1957.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. [redacted] 94

WILLIAM RADOVICH,

Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE, BERT BELL, J. RUFUS KLAWANS, BOSTON YANKS, NEW YORK RANGERS, NEW YORK GIANTS CLUB, PHILADELPHIA EAGLES, THE LOS ANGELES RAMS FOOTBALL CLUB, INC., PITTSBURGH STEELERS FOOTBALL CLUB, WASHINGTON REDSKINS, CHICAGO BEARS FOOTBALL CLUB, INC., CHICAGO CARDINALS FOOTBALL CLUB, DETROIT LIONS FOOTBALL CLUB, GREEN BAY PACKERS, SAN FRANCISCO CLIPPERS, et al.,

Respondents.

BRIEF OF RESPONDENTS NATIONAL FOOTBALL LEAGUE, CHICAGO CARDINALS FOOTBALL CLUB, INC., NEW YORK GIANTS FOOTBALL CLUB, INC., CHICAGO BEARS FOOTBALL CLUB, INC., DETROIT FOOTBALL COMPANY AND LOS ANGELES RAMS FOOTBALL CLUB IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 954

WILLIAM RADOVICH,

Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE, BERT BELL, J. RUFUS KLAWANS, BOSTON YANKS, NEW YORK RANGERS, NEW YORK GIANTS CLUB, PHILADELPHIA EAGLES, THE LOS ANGELES RAMS FOOTBALL CLUB, INC., PITTSBURGH STEELERS FOOTBALL CLUB, WASHINGTON REDSKINS, CHICAGO BEARS FOOTBALL CLUB, INC., CHICAGO CARDINALS FOOTBALL CLUB, DETROIT LIONS FOOTBALL CLUB, GREEN BAY PACKERS, SAN FRANCISCO CLIPPERS, et al.,

Respondents.

BRIEF OF RESPONDENTS NATIONAL FOOTBALL LEAGUE, CHICAGO CARDINALS FOOTBALL CLUB, INC., NEW YORK GIANTS FOOTBALL CLUB, INC., CHICAGO BEARS FOOTBALL CLUB, INC., DETROIT FOOTBALL COMPANY AND LOS ANGELES RAMS FOOTBALL CLUB IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

The petition for writ of certiorari presents two questions for the consideration of this Honorable

Court. The first question is framed in terms of "exemption" from the Sherman Act. The second attempts to probe the distinction between public and private injury flowing from asserted violations of anti-trust laws. Neither question receives specific treatment in the argument of petitioner. Inasmuch as the problems posed are generally embraced within the topical divisions of petitioner's argument, the brief in opposition will not consider the questions as such but will follow the numbering and subject division employed by petitioner in setting forth his "Reasons for Granting the Writ".

I.

EXEMPTION OF PROFESSIONAL FOOTBALL FROM ANTI-TRUST LAWS.

The petitioner apparently interprets the decision of the United States Court of Appeals for the Ninth Circuit as a determination that the sport of Professional Football is not subject to the provisions of the Anti-Trust laws by reason of certain conduct of Congress which implies an intention to exempt such sport. We do not believe the decision to be susceptible of such limitation. The result below is grounded upon and consistent with previous decisions of this and other Courts. It is obvious that the reference to Congressional indulgence found in the opinion is not the basis for the decision but has been added, as the terminology suggests, as a "further" persuasive fact.

The Court of Appeals for the Ninth Circuit has given consideration to the impact of the Anti-Trust

laws upon professional sport, has analyzed the principal decisions in this field of law and has determined that the facts of this case bring it within the rulings made relative to professional baseball. The determination is a well considered one. The proceedings below, as the opinion indicates were concerned in large measure with a comparative analysis of the *Federal Baseball* case (*Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898; Court of Appeals decision 269 F. 681), the *Toolson* case (*Toolson v. New York Yankees*, 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64), and the *International Boxing* case (*United States v. International Boxing Club of New York*, 348 U.S. 222, 75 S. Ct. 277, 99 L. Ed. 279). From such analysis it was decided that the *Baseball* cases were controlling, the Court stating:

> "If our first step is correct: that we have the right to compare, then the second one is obvious. Football is a team sport. *Its operation has just about the same aspects as baseball.* Boxing is an individual sport. *In professional football, very good arguments do exist for the indulgence of restraints on individual players.* Of course such indulgence could not stand against the positive commands of the Congress. In boxing, arguments for restraints on the individual's right to contract seem rather hollow." (Emphasis ours.)

The Court below is aware that baseball has had a full day in Court and that every facet of its pattern and operation has been considered in the judicial proceedings which resulted in the baseball decisions.

Should petitioner be of the belief that baseball was the beneficiary of judicial fiat which "exempted" the sport without good cause let it be pointed out that the Federal Baseball decision evolved from a protracted trial in the District Court. The expression "organized baseball" employed by the Court of Appeals and the Supreme Court in the *Federal Baseball* case is the synthesis of a voluminous record of testimony and documentary evidence. "Organized baseball" connotes the whole framework and the complete *modus operandi* of the business of baseball as disclosed by the record of the District Court. And no detail was omitted in the evidence presented to the lower Court. Upon appeal from a decision adverse to "organized baseball" the Court of Appeals (269 F. 681, 687) held:

> "Generally speaking, every player was required to contract with his club that he would serve it for one year, and would enter into a new contract 'for the succeeding season at a salary to be determined by the parties to such contract'. The quoted part is spoken of as the 'reserve clause', and it is found, in effect, in the contracts of the minor league players as well as in those of the major league players. For his services each player was given a certain consideration, and for consenting to the reserve clause another consideration, both of which were set forth in his contract. It is provided in the rules adopted by the leagues and in the National Agreement that, if a player violates the reserve clause, is guilty of 'contract-jumping', he shall be punished by being treated as ineligible to serve in any club of the leagues until he has been formally reinstated, and a list of such ineligible players is kept by the leagues.

The number of players which each club was permitted to employ was limited to 22. It is admitted that this was a reasonable number, and that none of the clubs retained more players than it needed. The number of skilled players available did not equal the demand, and clubs within the appellant leagues were competing among themselves for first-class players. One of the directors of the appellee admitted that, if his club had to compete for public favor with the appellants, it undoubtedly would have been driven to the ranks of the latter for many of its players. If the reserve clause did not exist, the highly skilled players would be absorbed by the more wealthy clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them. By means of the reserve clause and provisions in the rules and regulations, said one witness, the clubs in the National and American Leagues are more evenly balanced, the contests between them are made attractive to the patrons of the game, and the success of the clubs more certain. The reserve clause and the publication of the ineligible lists, together with other restrictive provisions, had the effect of deterring players from violating their contracts, and hence the Federal League and its constituent clubs, of which the appellee was one, were unable to obtain players who had contracts with the appellants; in other words, these things had the intended effect, viz. of preventing players from disregarding their obligations. On these provisions, all having for their purpose the preservation by each club of its necessary quota, and no more, of players, rests

> the gravamen of appellee's case. It must be obvious that the restrictions thus imposed relate directly to the conservation of the personnel of the clubs, and did not directly affect the movement of the appellee in interstate commerce. Whatever effect, if any, they had, was incidental, and therefore did not offend against the statute."

The language above quoted from the decision of the Court of Appeals of the District of Columbia was before the Supreme Court when writ of error issued to the lower Court. In the opinion of Mr. Justice Holmes is found *inter alia:*

> "The decision of the court of appeals went to the root of the case, and, if correct, makes it unnecessary to consider other serious difficulties in the way of plaintiff's recovery."

It appears clear that Mr. Justice Holmes regarded the business of giving exhibitions of baseball as "purely state affairs" and also decided that such exhibitions "would not be called trade or commerce in the commonly accepted use of those words." But it is equally clear that the whole pattern of organized baseball was patent to the Supreme Court when the *Federal Baseball* case was decided. The decision is not a summary dismissal of the subject.

There is not one charge made against professional football by the complaint before us that cannot be found as a proven fact in the record of the *Federal Baseball* case. The composition and *modus operandi* of professional football are identical with those of

"organized baseball". The garment was cut from the same pattern and by many of the same hands. With complete justification does the Court below in the instant matter conclude:

> "Its operation has just about the same aspects as baseball."

Baseball and football are each competitive team sports dependent for popular acceptance upon a well rounded schedule of exhibitions among teams of comparable strength. In order to provide a balanced program of events each sport is organized upon a league basis. Major league baseball consists of the National League and the American League, each comprised of eight teams, which maintain intraleague schedules during a regular season. The championship teams of both leagues meet in the World Series to determine the world championship. Football is similarly organized into leagues. Major calibre football is embraced within the framework of the National Football League and its constituent Western Conference and Eastern Conference, each comprised of six teams. A regular season intra-conference schedule determines divisional champions who meet in a World's Championship game.

Each sport is presided over by a commissioner who is delegated regulatory and disciplinary power.

Each sport is subject to governing agreements providing organization and regulating operation. In baseball these provisions are found in the organic rules of the National League of Professional Baseball Clubs

and of the American League of Professional Baseball Clubs and in the Major-Minor League agreement. The rules governing professional football are found in the constitution and by-laws of the National Football League, an unincorporated association.

The governing canons of each sport prescribe generally and in common:

(a) That a uniform player's contract shall be employed by all teams.

(b) That such contract shall provide, for the benefit of the club, an option to renew the agreement respecting the services of a player.

(c) That a player may only perform for the team with whom he is under contract or to which such contract is assigned.

(d) Violation of a contract or of the clause which "reserves" the player to a team will result in the suspension of a player.

(e) Ineligible players may be reinstated only by ruling of the Commissioner.

It is these underlying agreements and particularly the "reserve clause" provisions thereof which have been the gravamen of all of the complaints filed against both baseball and football to challenge the status of such sports under the anti-trust statutes.

The nature, history and purpose of the "reserve clause" are before the Courts in the Baseball cases, both old and new, and in the record below. They were fully understood by the Honorable Court of Appeals

for the Ninth Circuit when it recognized the similarity between baseball and football and stated in the decision here under consideration:

> "In professional football, very good arguments do exist for the indulgence of restraints on individual players."

The propriety of the courts' determination needs little review. It is obvious to the patrons of the sports that the so-called "reserve clause" is essential in order to maintain balance in the player personnel of the various teams and thus assure competition among teams of comparable strength. The device employed is but an option in the player's contract, granting to the club the right of renewal of the agreement for the services of the player. By such device is the public reassured that the player can be interested only in the success of the team to which he is under contract and to which it is likely his future playing days will be devoted. It is an insurance against the bestowal of "favors" upon an opponent team with whom the player may desire future affiliation.

Baseball had originally attempted to operate without the benefit of a "reserve clause" and the attempt was disastrous. All of the outstanding talent became concentrated in one or two teams, resulting in unequal contests which discouraged patronage and caused financial loss. The Court of Appeals in the *Federal Baseball* case was thoroughly apprised of the situation when it stated:

> "If the reserve clause did not exist, the highly skillful players would be absorbed by the more

> wealthy clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them." (269 F. 681, 687.)

This Honorable Court through Chief Justice Warren in *United States v. Shubert,* 348 U.S. 222, 75 S.Ct. 277, 99 L.Ed. 279, has indicated to us the opinion of the Court that the baseball cases may be read as "specifically fixing the status of the baseball business under the anti-trust laws *and more particularly the validity of the so-called 'reserve clause'* ". (Emphasis ours.)

The later baseball cases, *Toolson v. New York Yankees,* 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64, and *Kowalski v. Chandler* and *Corbett v. Chandler,* decided as companion cases with *Toolson,* confirm the identical pattern of the two sports. Although these cases came to the higher Courts after dismissals below and consequently have not the voluminous record of testimony found in *Federal Baseball,* each offers a complaint setting forth the very charges which are here under consideration with respect to football. The complaints in *Toolson, Corbett* and *Kowalski* are interchangeable with that of Radovich.

We set forth for comparative analysis the charging paragraphs of the Toolson and Radovich complaints.

Toolson.

"XI

"That the defendants and each of them, have entered into or agreed to be bound by a contract in the restraint of Interstate Commerce; that said contract is designated as the Major-Minor League Agreement, dated December 6, 1946, and provides in effect that:

1. All players' contracts in the Major Leagues shall be of one form and that all players' contracts in the Minor Leagues shall be of one form.

2. That all players' contracts in any league must provide that the Club or any assignee thereof shall have the option to renew the players' contract each year and that the player shall not play for any other club but the club with which he has a contract or the assignee thereof.

3. That each club shall, on or before a certain date each year, designate a reserve list of active and eligible players which it desires to reserve for the ensuing year. That no player on such a reserve list may thereafter be eligible to play for any other club until his contract has been assigned or until he has been released.

4. That the player shall be bound by any assignment of

Radovich.

"13

"The said unlawful conspiracy to monopolize, monopoly and attempt to monopolize, the contracts, combinations and conspiracies to restrain trade and commerce in the business of organized professional football have consisted and do consist of a continuing agreement and concert of action among the defendants, the substantial terms of which agreement and the means of such concert of action are as follows:

(a) That defendants agree that in making contracts with football players, each will use the uniform players' contract published by the National League.

(b) That defendants agree to insert in said uniform players' contract a reserve clause under the terms of which the football player binds himself not to sign a contract with or play for any club other than the club which originally employed him or its assignee. In effect this clause prevents a player from ever playing for any team other than his original employer unless the employer consents.

(c) That defendants agree that any player violating the reserve clause will be black-

Toolson.

his contract by the club, and that his remuneration shall be the same as that usually paid by the assignee club to other players of like ability.

5. That there shall be no negotiations between a player and any other club from the one to which he is under contract or reservation respecting employment either present or prospective unless the Club with which the player is connected shall have in writing expressly authorized such negotiations prior to their commencement.

6. That in the case of Major League players, the Commissioner of Baseball and in the case of Minor League players, the President of the National Association, may determine that the best interests of the game require a player to be declared ineligible and, after such declaration, no club shall be permitted to employ him unless he shall have been reinstated from the ineligible list.

Radovich.

listed by all clubs in the National League so that no club in the said National League may hire him."

It is inconceivable that a decision upon the basis of the facts set forth in the Toolson complaint would be inapplicable to the facts alleged in the Radovich complaint. The only distinguishing feature is that one sport is called "baseball" and the other "football".

The Court below in the instant matter was also aware that the "reserve clause" of football which was under consideration was a mollified version of that which baseball had presented for judicial scrutiny. The uniform contract employed by the National Football League grants to the club merely the right to a one year extension of the current contract. Such provision can scarcely be classified as unreasonable nor constitute a basis for the ludicrous label "peonage" which less adequately compensated members of the legal profession affix to player-club relations.

Petitioner places emphasis upon *U. S. v. International Boxing Club of N. Y.*, 348 U.S. 236, 75 S.Ct. 259, 99 L.Ed. 290. There is no parity between the sports of boxing and football, in organization or operation. The player control required in the team sports of football and baseball which is essential to maintain team balance and cohesion and to thus insure competition between teams of comparable strength finds no application in the sport of boxing (if indeed boxing may be called a sport). The complaint in boxing indicates nothing but an attempt to eliminate competition. There is absolutely no justification for an arrangement which places all contenders for the heavyweight boxing championship under contract to one promoter. Clearly, football conforms to the pattern of organized baseball and not to the heteronomous business of boxing.

However the members of this Honorable Court may have differed with Mr. Justice Frankfurter in the application of the rule of logic expressed in his opinion

in the *International Boxing Club* case, all must agree with the soundness of such statement:

> "Since, in the light of all the circumstances, Federal Baseball was left undisturbed by Toolson, I cannot bring myself to construe the respect that was thus accorded to stare decisis to be narrower than that all situations identic with what was passed on in the Federal Baseball case should be covered by it. I cannot translate even the narrowest conception of statae decisis into the equivalent of writing into the Sherman Law an exemption of baseball to the exclusion of every other sport different not one legal jot or tittle from it."

In football we have a sport which is veritably "different not one legal jot or tittle" from baseball. Reason impels the application of the baseball decisions.

II.

PUBLIC INJURY AS A NEW CONCEPT.

In the opinion of the Court of Appeals herein is found the following:

> "While detail is not necessary, it is essential that the complaint allege facts from which it can be determined as a matter of law that by reason of intent, tendancy or the inherent nature of the contemplated acts, the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce."

Petitioner would have us believe that the element of public injury is a novel concept and a departure

from "accepted tradition". It is contended that the requirement of public injury is a new doctrine which the Ninth and Tenth Circuits have seized upon. The position of petitioner disregards the basic purpose of the anti-trust legislation, opinions of this Honorable Court and opinions of various circuits additionally of the Ninth and Tenth Circuits.

Reflections upon the legislative history of the Sherman and Clayton Acts reminds us that Congress had not the intention of creating a mode of redress for private injury occasioned by combination or conspiracy. The legislative intent as interpreted by Chief Justice White as early as 1915, in *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U.S. 165, 35 S.Ct. 398 is as follows:

> "In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute, but the remedies which it provided were coextensive with such conceptions."

In *Appalachian Coals Inc. v. United States*, 288 U.S. 344, 360, this Court said, citing a long line of cases:

> "The decisions establish, said this Court in Nash v. United States, 229 U.S. 373, 376, 57 L.Ed. 1232, 1235, 33 S.Ct. 780, 'that only such contracts and combinations are within the act as, by reason

of intent or the inherent nature of the contemplated acts, *prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.*"

In *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 500, this Court stated:

> "Labor cases apart, which will presumably be discussed, this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, *for the public wrongs which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition.*"

The private statutory claim or right of action to recover treble the damages proximately caused by a violation of the Sherman Act was created to induce private persons to aid in the enforcement of that Act. The private right of action is incidental and subordinate to the protection of the public.

The rule is concisely set forth in *Abouaf v. J. D. & A. B. Spreckels Co.* (N.D. Calif.), 26 Fed. Supp. 830, 832:

> "The main purpose of the Anti-Trust Acts was to provide protection for the public from monopolies and restraint of trade; and the individual right of action was incidental and subordinate. A complaint to state a cause of action must show not only damages sustained by the individual plaintiff, but even more importantly, a violation of public rights prohibited by the Act."

The opinion of the Court below in the *Radovich* case cites *Fedderson Motor Co. v. Ward* (10th Cir. 1950),

180 F. (2d) 519, in support of its statement relative to the requirement of public injury. The *Fedderson* decision had stated (180 F. (2d) 519, 522):

> "Facts were alleged which tended to show that the conspiracy as contemplated and effectuated harmed plaintiff. But that was not enough. In addition, it was essential that the pleading allege facts from which it could be determined as a matter of law that the conspiracy contemplated or tended to restrain interstate commerce, with harmful effect to the public interest."

If we correctly interpret the petition of Mr. Radovich it is the contention of petitioner that the foregoing quotation from *Fedderson* is a fiction of the 10th Circuit (concurred in by the 9th Circuit) and predicated upon a misinterpretation of *Shotkin v. General Electric Co.* (10th Circuit 1948), 171 F. (2d) 236, which is in turn predicated upon an overstatement of *Glenn Coal v. Dickinson Fuel* (4th Circuit 1934), 72 F. (2d) 885. May we attempt to unravel this bit of dialectics in inverse order.

Petitioner has quoted from the opinion of the 4th Circuit in *Glenn Coal v. Dickinson.* A more apposite selection would have been the following:

> "Thus, the declaration to be good must show not only damages sustained by the individual plaintiff but even more importantly a violation of public rights prohibited by the Act. It is not sufficient that the declaration shows merely a good cause of action at common law."
>
> *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F. (2d) 885, 889.

Petitioner might also with more relevancy have substituted for the portion of *Shotkin v. General Electric Co.* quoted by him, the following excerpt from such case:

> "Injury to plaintiff of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages. There must be harm to the general public in the form of undue restriction of trade and commerce as the result of the wrongful contract, combination or concert."
>
> *Shotkin v. General Electric,* 171 F. (2d) 236, 239.

It is obvious from the two quotations above set forth that *Fedderson* is no more extensive than the decisions which preceded it. Nor is it contrary to the case of *City of Atlanta v. Chattanooga Pipe and Foundry* (6th Cir. 1903), 127 Fed. 23, as petitioner contends. The public injury in such case had already been established in proceedings instituted by the United States against the pipe trust, which proceedings resulted in a decree dissolving the trust. In fact so obvious was the public nature of the injury that the public corporation, the City of Atlanta, had a difficult time in convincing the Court that it was a private person entitled to maintain a treble damage action.

Petitioner cites *Roseland v. Phister* (C.C.A. 7th Cir. 1942), 125 F. (2d) 417 as a private action case germane to this discussion. Unquestionably it is a private action case which determined that a sales agent of one of the offending combine could recover under the treble damage provisions. The element of public

injury is not discussed but is certainly present in that there appears the fact that the Federal Trade Commission had upon complaint obtained a consent cease and desist order.

Petitioner further cites *National Used Car Market Report Inc. v. National Automobile Dealers Assn.* (D.C. Circ. 1952), 200 F. (2d) 359 as a decision contrary to the public injury doctrine. We submit that the decision does not have such import. It rather recognizes the doctrine and turns upon the question of the adequacy of the allegations to satisfy the requirement. The Court concludes:

> "We think it might be determined as a matter of law that the broad trade boycott here alleged is reasonably calculated to prejudice the public interest."

The added thought ". . . . we think it is not necessary to make specific allegations or proof of public injury in order to show that a trade boycott of such breadth violates the Sherman Act" does not negate the finding of a sufficient allegation of public injury. Nor is such statement tantamount to a declaration that public injury need not be ascertainable from the complaint.

The remaining cases cited by petitioner under this subject heading do not contribute to this discussion. The portion quoted from *Wheeler-Stenzel Co. v. National Window Glass Jobbers Assn,* 152 Fed. 864 is so out of context as to be meaningless. It can only be read in conjunction with the dissertation upon the private consequences of public wrong, which preceded it. It was therein unsuccessfully contended that in

addition to a violation of the anti-trust statute there must be some common-law tort or breach of contract resulting from the public offense in order that a party injured might recover three-fold damages. The contention is disposed of by a quotation from Bishop on Non-Contract Law:

> "Whenever the law, a statute, a municipal by-law, or any other law, imposes on one a duty if of a sort affecting the public within the principles of the criminal law, a breach of it is indictable and a civil action will lie in favor of any person who has suffered especially therefrom."

Then follows the language quoted in the Radovich petition. It is certainly no holding that public injury is not to be considered.

The case of *Albert Pick-Barth Co. v. Mitchell Woodbury Corporation,* 57 F. (2d) 96, (C.C.A. 1st Circ.) is something less than a legal landmark if the number of times which it has been cited would be a criterion. The decision was made after a jury trial and seems to be resolved by a patent intent to restrain interstate trade. On the same page where appears the quotation culled by petitioner the Court determines that the proof of a conspiracy to suppress competition is a violation of the Sherman Act, and further determines that a price fixing combination regardless of result is an unreasonable restraint of trade *"because it restricts competition to which the public is entitled"*. The Court is not as unmindful of the public interest as it would profess by the language found in the Radovich petition.

The case of *Monarch Tobacco Works v. American Tobacco Co.*, 165 F. 774 has been cited by petitioner and briefly quoted. The language used is part of a general preface discussion of the Sherman Act which has no part in the decision of the case. The case merely holds that an inchoate conspiracy is a violation of the act since the statute prohibits an "attempt" to monopolize.

The 2nd Circuit decision in *Gardella v. Chandler*, 172 F. (2d) 402 serves no purpose in this discussion other than to review for us the language which prompted petitioner to file below with an assurance that Federal Baseball would be overturned upon the first opportunity afforded the Supreme Court. The complete divergence of the three opinions and the subsequent action of this Court in the Toolson matter leave the *Gardella* case with little standing.

In summation of this topic we respectfully submit that no conflict exists among the various circuits which would require review of this Honorable Court. The requirement of a public injury has been a determination of the Supreme Court and has been consistently imposed by the Courts regardless of circuit. Indicative and declarative is the language of the 3rd Circuit Court of Appeals in *Hunt v. Crumboch*, 143 F. (2d) 902:

> "Congress did not undertake by the enactment of the Sherman and Clayton Acts to prohibit each and every restraint upon interstate commerce. It sought to prevent only those restraints upon free competition in business or commercial transactions which tend to restrict production, raise

prices or otherwise control the market in goods or services to the detriment of the public."

III.

INHERENT PUBLIC INJURY.

By attempt to argue an "inherent" public injury from the facts alleged in the complaint, petitioner concedes the cogency of our position that the element of public injury is an essential one. This more realistic approach affords us an opportunity to analyze the opinion of the Court below as a decision upon the facts alleged in the complaint rather than as an abstract legal treatise.

At the outset it must be recognized that the Court was as vigilant as petitioner in search for "inherent" public injury. Despite the implication of the petition the Court of Appeals did not insist upon a specific allegation of public injury. Even the *Fedderson* case which disturbs petitioner, merely requires "that the complaint allege facts from which it can be determined as a matter of law that by reason of intent, tendancy *or the inherent nature* of the contemplated acts, the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce." The Court below applied the inherent nature norm and concluded:

> "Within the four corners of the complaint, we doubt that the alleged means, restraint by the reserve clause and its enforcement is legally sufficient to support, without more, a conclusion that

these means were calculated to prejudice the public or unreasonably restrain interstate commerce."

Petitioner sets forth the four principal allegations of the complaint and makes contention that the facts alleged are violations of the anti-trust laws which have inherent adverse effect upon the public. We review the allegations:

"(1) Respondents attempted by unlawful combination and contract to control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States."

In his consideration of this allegation petitioner cites various cases involving general business associations, trusts and monopolies. He concludes that no difference exists in the application of anti-trust principles to a sport or to any other type of business. The Courts have held to the contrary. The Baseball cases are controlling upon this point.

"(2) Respondents adopted uniform players' contracts containing reserve clauses, published by the National League."

Petitioner argues that the uniform adoption of industry regulatory contracts are in violation of the anti-trust laws. We deny the parity. There is a cognizable difference between the staging of sporting events and operation in the general world of business. In sport, competition between teams must be *stimulated* in order to reflect profit to the club owners. In business the *elimination* of competition results in profit. Obviously, therefore, the restraints employed in the one field

differ wholly in type and object from the restraints employed in the other.

The nature, history and purpose of uniform contracts and reserve clauses in the field of professional sports have been thoroughly considered by the Courts and have been found to be not in violation of the anti-trust laws.

From this allegation petitioner also infers an "inherent economic effect" in decreased player salaries. Such inference is confuted by the very allegations of the complaint. Other allegations tell us that the reserve clause in effect among the National Football League Clubs prevented his employment by other teams in such league and forced him to take employment in the rival All America Conference at twice the salary he had been receiving in the National League. The transcript of record also discloses that employment was available to petitioner as a professional football player in the Canadian Football League, a wholly independent association. The record further indicates that petitioner took advantage of such employment and played in the Canadian League during the years 1948 and 1949, the very period during which he was allegedly foreclosed from his profession.

The further conclusion of petitioner that the player controls prevent competitive clubs from obtaining needed talent is preposterous. The very purpose of the regulations is to assure an equal distribution of player talent.

As part of his analysis of his allegation (2) petitioner alludes to the "then competing All-America

Conference" and states that "since said time this Conference has been merged with respondents". The demise of the All-American Conference is not within the allegations of the complaint and should have no part in this discussion. Lest, however, it should be inferred that the complained of conduct of respondents effected by merger the elimination of a competing league may it be pointed out that no merger did in fact result. The All-America Conference withdrew from the field because it was unable to survive financially in open and unbridled competition with the National Football League. It was not the failure to obtain players which foretold its collapse but rather the competition for public patronage. Upon the dissolution of the All-America Conference two of its member clubs made application for admission to the National Football League and were accepted. There was no merger of the leagues.

"(3) That the respondents uniformly blacklist players who violated the reserve clause."

In the complaint of Toolson appears the same allegation, in language as follows:

"that the Defendant, George M. Troutman, placed plaintiff on the ineligible list of the Binghamton Exhibition Company, Inc., on the 25th day of May, 1950; that Plaintiff has been held and is still held on such ineligible list at this time".

The citation of *Fashion Originators Guild v. Federal Trade Commission,* 114 F. (2d) 80 is not in point. The *Toolson* case is a specific decision upon this precise fact.

"(4). That the respondents forced petitioner to sign a reserve clause restraining his playing football for anyone else but one club for life and in effect throughout the United States and boycotted him on its violation."

In the interests of accuracy it should be recorded that the reserve clause provisions under scrutiny are the following:

"The Player will not play football during 1945 otherwise than for the Club . . .

"Any time prior to August 1, 1946 by written notice to the Player, the Club may renew this contract for the term of that year . . ."

Even though we do not believe that the facts support the allegation we will address our comments to the allegation. In its broadest comprehension the allegation is not a novel one. It was before the Courts as part of the baseball pattern and was found unobjectionable. *Federal Baseball* (269 F. 681, 687) viewed the same facts and commented:

"The reserve clause and the publication of the ineligible lists, together with other restrictive provisions, had the effect of deterring players from violating their contracts . . . in other words these things had the intended effect, viz. of preventing players from disregarding their obligations."

Apparently the Court saw a public benefit flowing from the restraints rather than a public injury.

The general import of the listing of such allegation as embodying an inherent public injury would seem to be that the treatment of Radovich is a matter of public

concern. The argument relies upon the common law concept that provisions restricting one from the practice of his trade were void as against public policy. Such concept is something other than the public injury flowing from a restraint upon interstate commerce which the decisions require as a prerequisite to a suit by a private person for treble damages under the anti-trust laws. Furthermore an infringement of such public policy, would not be a public injury of a type which would affect prices, diminish the free flow of goods or bring about a deterioration in the quality of goods or services furnished to the public. The elimination of Radovich from the lineup of the National Football League, from the standpoint of the public would be immaterial if there were others to replace him in the program.

In *Hunt v. Crumboch* (C.C.A. 3rd Circ.), 143 F. (2d) 902 (affirmed by the Supreme Court upon a different issue) the point is covered:

> "We must assume, for nothing to the contrary appears in the plaintiff's case, that the number of haulers available to haul produce and foodstuffs was not diminished but simply that some other hauling concern took over the work formerly performed by the plaintiffs and that there was no increase in the cost of hauling traceable to the acts of defendants in eliminating the plaintiffs from the field. It is in the public interest that the supply of commodities and services be undiminished and the cost not increased. From the standpoint of the public however, it is immaterial whether the plaintiffs or others provide the services."

The principle of law is stated thusly in *Conference of Studio Unions v. Loews, Inc.*, 193 F. (2d) 51:

> "... in order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed *which harms him.* He must show that he is *within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry.* Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws.
>
> "Such a construction is in accordance with the basic and underlying purposes of the anti-trust laws to preserve competition and to protect the consumer. Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and *withheld from those who seek the windfall of treble damages because of incidental harm.*" (Emphasis ours.)

That allegation (4) does not embody inherent public injury is attested by statutes and decisions in the field of personal service contracts involving special and unique talent. In the home state of petitioner, California, statutes make provision for injunction against the breach of a contract for the rendition of such service when the stipulated compensation is not less than $6,000 per annum (California Code of Civil Procedure §526; Civil Code §3423). The Labor Code of such state by §2855 also permits the enforcement of a contract for special services, *for a term of not to exceed seven years.* A one year contract with an op-

tion of renewal for an additional year obviously offends no public policy of that state. Courts of Equity in the cases of *Cincinnati Exhibition Co. v. Marsans*, 216 Fed. (D.C.) 269, and *Philadelphia Ball Club Ltd. v. Lajoie*, 202 Pa. 210, 51 Atl. 973, found no compelling public policy intervening when enforcing the negative covenants of similar baseball contracts. In short, legislatures and Courts of Equity have declared the public policy and interest in favor of the enforcement of this type of agreement, and the "reserve clause" which is set before us with a one year term and a one year option is well within the limitations prescribed by statute and decision.

The argument of petitioner is open to further attack in that there is no causal connection between any injury to the petitioner, (whether inherently of public concern or of mere private concern) and any alleged act which constituted a violation of the anti-trust laws. The allegations fail to suggest, much less affirmatively show, that the player regulations had a substantial or indeed any effect upon interstate trade or commerce. It is certain that they were not intended to affect interstate trade or commerce. Their object was to maintain a team balance in player talent and thus furnish the best competition possible. Interstate communication and travel, stressed at length in the complaint are certainly incidental to the playing of football games, but the aggrieving player regulations in no manner affected such interstate incidents of the sport. In short, the petitioner was not injured "by reason of anything forbidden or declared to be unlawful by this act."

We respectfully urge that the decision of the Honorable Court of Appeals for the Ninth Circuit is a correct disposition of the matter and that no cause exists for the granting of a writ of certiorari.

Dated, San Francisco, California,
June 11, 1956.

Respectfully submitted,

MARSHALL E. LEAHY,
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Attorneys for said Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 94

WILLIAM RADOVICH, *Petitioner*,

v.

NATIONAL FOOTBALL LEAGUE, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

NATIONAL FOOTBALL LEAGUE, CHICAGO CARDINALS FOOTBALL CLUB, INC., NEW YORK GIANTS FOOTBALL CLUB, INC., CHICAGO BEARS FOOTBALL CLUB, INC., DETROIT FOOTBALL COMPANY and LOS ANGELES RAMS FOOTBALL CLUB

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INTRODUCTION

Petitioner has framed two questions for the consideration of this Honorable Court. Neither serves the purpose of Rule 40-1(d) in that neither delineates the issues. The first couched in the terms of "exemption" is meaningless.

No contention is made that the National Football League is exempt from the application of the Sherman Antitrust Act. The second is too broad. Petitioner fails to focus attention upon the allegations of his own complaint, the dismissal of which constitutes the basis for discussion.

Consequently it is appropriate to present for determination not the questions presented by the petitioner, but rather the following:

QUESTIONS PRESENTED

A. Lack of Jurisdiction of the Subject Matter

Whether certain reasonable restraints on players exercised by professional football to promote athletic competition are not in violation of the antitrust laws by reason of decisions of the Supreme Court of the United States that identical aspects found in the structure of organized baseball were not intended by Congress to be embraced within the scope of the antitrust laws.

B. Failure to State a Claim Upon Which Relief Can Be Granted

1) Whether plaintiff's Complaint failed to state a claim upon which relief can be granted in that

(a) it failed to allege any causal connection between any alleged injury to plaintiff and anything forbidden in the antitrust laws, and

(b) it failed to allege that any act of respondents by which plaintiff might have been injured was calculated to prejudice, or did prejudice the public or unreasonably restrain interstate commerce.

2) Whether plaintiff's Complaint constitutes a labor claim specifically exempted from the antitrust laws by the Clayton and Norris-LaGuardia Acts.

COUNTER-STATEMENT OF THE CASE

The plaintiff while under contract to render services as a professional football player to the Detroit Lions, a member of the National Football League, in disregard of the obligation of such contract, agreed to render and did render like services to the Los Angeles Dons, a member team of a rival league, the All-America Conference. The compensation agreed to be paid plaintiff by the Los Angeles Dons was double that prescribed in the contract of the Detroit Lions (R. 11, 12).

By reason of the violation of the contract of a member team, the National Football League placed the name of plaintiff upon a suspension list for a period of five years, in accordance with an established disciplinary procedure. (R. 14, 15)

Plaintiff played with the Los Angeles Dons during the 1946 and 1947 seasons (R. 14). It is alleged that in 1948 plaintiff received an offer to serve the San Francisco Clippers of the Pacific Coast League, as a player and coach for an annual salary of $5000. (R. 14, 15). It is further alleged that by reason of the suspension of plaintiff by the National Football League and the existence of a relationship between such league and the Pacific Coast League, the offer was withdrawn. (R. 15).

The foregoing are the ultimate facts. Allegations designed to afford a basis for jurisdiction under the Sherman and Clayton Acts are added. Interstate activity is alleged in the travel of teams from state to state in order to stage exhibitions at various league cities and in contracts entered into with broadcasting and televising companies for the right to carry narratives and pictures of the exhibitions (R. 7, 8).

The monopoly or conspiracy are alleged by recital of the following:

(a) An agreement that all teams of the National Football League shall use a uniform players contract.

(b) An agreement to insert in said uniform players' contract a "reserve clause" binding the player to the club with whom he has contracted.

(c) An agreement to black-list a player who violates the "reserve clause". (R. 10)

These are the facts material to this discussion. Petitioner has protested that the decision below has "distilled" his complaint. We recognize his right to have the complaint considered from its four corners. However, the complaint is based upon the "reserve clause" feature in the organization of professional baseball and football. Thus, the "reserve clause" is the gravamen of the action.

SUMMARY OF THE ARGUMENT

A. LACK OF JURISDICTION OF THE SUBJECT MATTER

(1) Stare Decisis

The Supreme Court of the United States in decisions relative to organized baseball (*Federal Baseball, Toolson, Corbett and Kowalski, infra*) ruled that certain aspects of the operation of the business of baseball were not violative of the antitrust laws. These decisions did not "exempt" baseball from the impact of the antitrust laws. They stand as a determination that certain aspects in the organization of baseball, designed to promote athletic competition, were not intended by Congress to be included within the scope of the antitrust laws. The sport of professional football has adopted the same aspects of baseball which received judicial approbation and in reliance upon such approbation has developed an organizational pattern identical with that of baseball. These parallel aspects of football have been offered for judicial scrutiny by the complaint before us. The Court below having determined that the operation of football "has just about the same aspects as base-

ball" was correct in sustaining the dismissal upon the holding in the baseball cases. *Stare decisis* compels such result.

(2) Radio and Television

The transmission of reports of football games by radio and television does not constitute a basis for distinguishing the case at bar from *Federal Baseball.* Interstate transmission of reports was also present in the original baseball factual situation and no legal basis for distinction exists. A local activity is not transformed into an interstate activity by a report thereof relayed through instrumentalities of interstate commerce. The respondents themselves are not engaged in broadcasting or telecasting and the sale to others of rights to transmit a report of the local exhibition does not convert the thing reported into the same species as the reporting medium.

(3) Validity and Reasonableness of Player Restrictions

The gravamen of the complaint of petitioner is the "reserve clause" employed by football to wed a player to a particular team. The same clause constituted the substance of the grievance in each of the baseball cases. Its validity and reasonableness have been passed by both Court and Congress as part of the baseball pattern. No reason in law or logic exists why the same determination should not result when the same clause is presented as part of the football pattern.

Even should it be resolved that for some reason the baseball decisions are peculiar to the business of baseball and not applicable to other similar facts, the clause, as part of the football structure is reasonable. Though football be interstate commerce and subject to the antitrust laws in all of its aspects, yet restraints upon interstate commerce are objectionable only when unreasonable. All of the reasons advanced by the Courts and Congress in upholding Baseball's "reserve clause" apply with equal

force to that of football. The position of football is even more cogent and its application of the clause less questionable than the employment of the like clause by baseball.

The Court below was correct in concluding "In professional football, very good arguments do exist for the indulgence of restraints on individual players".

(4) Boxing and Shubert Cases Distinguished

The Court of Appeals for the Ninth Circuit made a comparison of the constituents of football with those of baseball and boxing and determined that football was comparable to baseball rather than boxing. The determination is a correct one. Boxing has none of the aspects of football and the *Boxing* decision *infra,* is inapplicable. Baseball and football are team sports which have found it necessary to adopt a league organization in order to provide team competition. Spectator interest can only be maintained by balanced teams and such balance is preserved by player control in the form of contracts, reserve clauses and sanctions. None of these elements is present in the boxing format, nor does cause exist for their use in the staging of boxing exhibitions.

The Court of Appeals was likewise correct in not applying the decision of the Supreme Court in the matter of *U. S.* v. *Shubert, infra.* There is no similarity between the issues there and here raised. The *Shubert* decision is controlled by the *Hart* case, *infra,* and not by the *Baseball* cases.

B. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

(1) Causal Connection

Section 4 of the Clayton Act affords a right of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust

laws." The complaint in the case at bar alleges no causal connection between any alleged injury and "anything forbidden in the antitrust laws."

(a) Deficiency of Complaint

It is true that the complaint has alleged that certain of the activities of the defendants are related to the use of instrumentalities of interstate commerce, to wit, radio and television. It is not alleged however that respondents have attempted to monopolize radio or television nor that what was done in telecasting the games has any causal connection with the damage alleged. On the contrary plaintiff alleges that he has been harmed by provisions in a player's contract and by disciplinary procedures invoked against a breach of such contract, all of which features are part of the aspect of football which relates to the promotion of competition among teams in local exhibitions.

The complaint is further deficient in that its allegations indicate that plaintiff has suffered no damage whatever because of other employment; and that any refusal of respondents to grant further employment to plaintiff is justified by his previous conduct in violating his contract obligations.

(b) League Members as Quasi-Partners

The member teams of the National Football League stand in the relationship of quasi-partners and are permitted under the decisions herein cited to adopt rules for their mutual protection and direction, provided the same are not unreasonable or contrary to the public interest. The agreements relative to player control are not unreasonable and violate no principle of antitrust law protection.

(2) Public Injury

The plaintiff has failed to allege that any act of the defendants by which he was injured was reasonably cal-

culated to prejudice the public interest by unduly restricting the free flow of commerce. The purpose of the antitrust acts was to provide protection for the public from monopolies and unreasonable restraints of trade; and the individual right of action was subordinate and incidental. A complaint to state a cause of action must show not only damages sustained by the individual plaintiff, but even more importantly, a violation of the public rights which the act was intended to protect.

(3) Labor Claim

The gist of petitioner's claim is that he has been deprived of the opportunity to render services as a professional football player by an agreement among employers engaged in giving exhibitions of professional football, not to employ persons as football players except under the terms and conditions of a specified uniform players contract. The subject of the allegedly illegal agreement and of plaintiff's claim is personal service or labor. Aside from the other fatal defects in petitioner's alleged claim, it is clear that the provisions of the Clayton and Norris-LaGuardia Acts establish that the complaint fails to state a statutory claim under the antitrust acts.

ARGUMENT

A. LACK OF JURISDICTION OF THE SUBJECT MATTER

(1) Stare Decisis

It is not the contention of respondents that professional football is exempt from the antitrust laws. Nor do we understand that baseball or any other sport possesses an exemption from the Sherman and Clayton Acts. The use of the term "exemption" is inaccurate and confusing. Whatever position organized baseball occupies with respect to these laws is predicated upon judicial interpretation of the meaning and intent of the Acts. Courts have no power to grant an exemption from statutes to any person or activity. Such is the prerogative of Congress and nothing is

found in these statutes which could be construed as a specific exemption of sports in general or baseball in particular.

The decisions of the Supreme Court of the United States relative to the sport of baseball (*Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs,* 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898; *Toolson* v. *New York Yankees, Kowalski* v. *Chandler, Corbett* v. *Chandler,* 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64) are determinations of legislative intent. They establish the position that Congress did not intend to include within the scope of the antitrust laws certain aspects of "organized baseball" which were before the court for consideration. The aspects which were considered are found in the voluminous transcript of the *Federal Baseball Case, Volume 64 Transcript of Records, United States Supreme Court,* No. 204 (1921). They are what Justice Frankfurter has referred to as "the constituents of baseball" (*United States of America* v. *International Boxing Club of New York,* 348 U.S. 236). Congress has referred to them as "the aspects of baseball which are solely related to the promotion of competition on the playing field". (*H.R. Rep. No. 2002, (Organized Baseball) 82nd Cong. 2nd Sess. p. 230*) The principal feature considered was the so-called "reserve clause".

The Baseball Cases are not decisions that organized baseball is beyond the scope of the antitrust laws in all of its aspects. Apparently Congress has understood the Federal Baseball decision to apply to only certain aspects of the sport. *(H.R. Rep. 2002, supra, p. 230).* The United States District Court for the Eastern District of Pennsylvania correctly analyzed the matter in *U.S.* v. *National Football League,* 116 F. Supp. 319, wherein Judge Grim states:

> "I am not unmindful of the decisions of the Supreme Court in Federal Baseball Club v. National League, 259 U.S. 200, and in the very recent cases, decided November 9, 1953, of Toolson v. New York Yankees, Inc.,

> Kowalski v. Chandler, and Corbett v. Chandler, ... U.S. ..... In those baseball 'reserve clause' cases the Court dismissed antitrust suits against the major professional baseball leagues on the theory that big-league baseball is a sport, local in its nature, and not interstate commerce. The only restriction alleged in the baseball cases was in the internal operation of professional baseball itself. The only question involved in those cases was whether professional baseball itself is interstate commerce. No question of restrictions on the sale of radio and television rights was involved in those cases. The present case, on the other hand, primarily concerns restrictions imposed by the National Football League on the sale of radio and television rights. Therefore, the present case basically concerns the League's restraint of interstate commerce in the radio and television industries. It is obvious that whether professional football itself is or is not engaged in interstate commerce is immaterial in the present case and that the decisions in the baseball cases referred to do not control the present case."

From the foregoing, including the citation of *U.S.* v. *National Football League,* it should be apparent to the Court that we concede that professional football can violate the antitrust laws. *And so can baseball.* It would be incongruous that if all the various sporting interests should conspire to eliminate the Columbia Broadcasting System from the broadcasting and the telecasting of sporting events, the court should permit the conviction of the National Football League, the United States Lawn Tennis Association and others, but nevertheless grant "exemption" to organized baseball.

Respondents contend that should the aspects which were found to be outside the scope of antitrust laws in the baseball cases be found in the organics of any other sport, then that sport would be entitled to the benefit of the baseball decisions. The doctrine of *stare decisis* demands such treatment. It is the further contention of respondents that professional football in its organization presents the iden-

tical aspects which are the constituents of baseball and that it is these aspects of the activity which constitute the basis of the complaint of Radovich.

Prior to a review of the identical aspects of baseball and football it might be well to re-appraise the principle of *stare decisis*, since language appearing in *United States* v. *Shubert*, 348 U.S. 222, causes apprehension that the doctrine is not to be accorded its accepted application when the proto-type is the *Federal Baseball* case. In the *Shubert* opinion reference is made to the reaffirmance of *Federal Baseball* in the *Toolson* decision with this qualification: "In short Toolson was a narrow application of the rule of stare decisis." Preceding the foregoing quoted sentence the *Shubert* opinion recited certain circumstances which it believed had influenced the *Toolson* decision. These are set forth as follows:

> "For over 30 years there had stood a decision of this Court specifically fixing the status of the baseball business under the antitrust laws and more particularly the validity of the so-called 'reserve clause'. During this period, in reliance on the Federal Base-Ball precedent the baseball business had grown and developed. . . . And Congress, although it had actively considered the ruling, had not seen fit to reject it by amendatory legislation."

The circumstances recited are tantamount to a demand for facts constituting an estoppel. But the doctrine of *stare decisis* is not a mere foreclosure procedure. It is not generally recognized that the application of *stare decisis* is as limited as the principle of *res adjudicata*. However if it be the opinion of this Honorable Court that *Federal Baseball* be available only to those who have relied upon the decision and the attitude of Congress may we present the circumstances attendant with the development of professional football over the past 35 years.

The complaint of Radovich attests that the National Football League was organized in 1921, the very year in which

the Supreme Court sustained the decision of the Court of Appeals of the District of Columbia in *Federal Baseball* (R. 5). The complaint here before us further informs us that professional football borrowed from baseball the pattern of league organization (R. 5), uniform contracts, a reserve clause and the sanction of blacklisting (R. 10). Those engaged in the formation of the pattern of football had as a guide not only the general court approval of the pattern employed by baseball but the more specific comparison of the two sports:

> "If a game of baseball before a concourse of people, who pay for the privilege of witnessing it is trade or commerce then the college teams who play *football* where an admission fee is charged engage in an act of trade or commerce. But the act is not trade or commerce—it is sport". (*Federal Baseball Case*, 269 F. 681)

Even the nomenclature is identical, "uniform players' contract", "reserve clause", "blacklist", "option", "draft", and "waiver".

It is inconceivable that the identical organization of the professional sports of baseball and football could have been the result of unconscious parallel action. One was fashioned upon the other and both in reliance upon *Federal Baseball*.

The Attorneys for the government who have evidenced such interest in the pending matter, have heretofore, in briefs filed by them in the *Boxing*, and *Shubert* cases prescribed a formula to determine which if any activity, comparable to baseball should be permitted the advantage of the baseball decision. The requisites are reliance upon the *Federal Baseball* decision in the construction of a pattern of operation. Government counsel should find satisfaction in a sport which was born concurrently w ch the *Federal Baseball* decision and which used the format which had there obtained judicial approval.

While professional football is content with the imposition of a reliance qualification in order to invoke the doctrine of *stare decisis*, it is constrained to point out that such is not the controlling norm. "The application of the doctrine of stare decisis is essential to the performance of a well ordered system of jurisprudence." "Where a ruling made by an able bench, after full argument by able counsel, has been followed and applied in divers cases, and has been left unmolested by the General Assembly, it should not, unless for impelling reasons, thereafter be changed by the Court." (*Cobb* v. *Georgia*, 187 Ga. 448, 200 S.E. 796)

Any attempt by a court to limit a decision to the precise facts before it can only merit the criticism of Justice Holmes in *Haddock* v. *Haddock*, 201 U.S. 562:

> "But a court, by announcing that its decision is confined to the facts before it, does not decide in advance that logic will not drive it further when new facts arise . . . I think it reasonable to ask for an articulate indication of how it is to be distinguished."

The application of the doctrine of *stare decisis* to a factual situation with all of the features of the baseball case is most cogently urged by Justice Frankfurter in the *Boxing Case (supra)*:

> "In 1922, the Court found commercialized baseball outside the scope of the Sherman Law. Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898. Last Term the Court refused to re-examine 'the underlying issues' of this adjudication and adhered to it. Toolson v. New York Yankees, Inc., 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64. What were the 'underlying issues'? They were the constituents of baseball in relation to the Sherman Law. By adhering to that decision, the Court refused to depart from a judgment necessarily based on these constituent elements. To my understanding, that is what is meant by 'without re-examination of the underlying issues.' The Court decided as it did in the Toolson case as an

application of the doctrine of stare decisis. That doctrine is not, to be sure, an imprisonment of reason. But neither is it a whimsy. It can hardly be that this Court gave a preferred position to baseball because it is the great American sport. I do not suppose that the Court would treat the national anthem differently from other songs if the nature of a song became relevant to adjudication. If stare decisis be one aspect of law, as it is, to disregard it in identic situations is mere caprice."

* * * * *

"... Since, in the light of all the circumstances, Federal Baseball was left undisturbed by Toolson, I cannot bring myself to construe the respect that was thus accorded to stare decisis to be narrower than that all situations identic with what was passed on in the Federal Baseball case should be covered by it. I cannot translate even the narrowest conception of stare decisis into the equivalent of writing into the Sherman Law an exemption of baseball to the exclusion of every other sport different not one legal jot or tittle from it."

The reasoning of Justice Frankfurter is unassailable when applied to the case at bar. We believe that a factual variance between the constituents of baseball and boxing would justify the refusal of the Court to apply the doctrine when considering boxing. But veritably, baseball and football differ "not one legal jot or tittle". In the words of Justice Holmes, we "think it reasonable to ask for an articulate indication of how" they "are to be distinguished."

What then are the aspects of baseball which were before the Court in *Federal Baseball* and *Toolson* and which football claims are duplicated in football organization? Be it remembered that baseball was not the beneficiary of judicial largess which "exempted" the "national pastime". As Justice Frankfurter expressed it in the *Boxing* case: "It can hardly be that this Court gave a preferred position to Baseball because it is the great American sport."

The *Federal Baseball* decision evolved from a protracted trial in the then Supreme Court of the District of Columbia. The condensed transcript of those proceedings extends through 522 pages in the files of this Court. *Vol. 64 Transcript of Records U. S. Supreme Court, No. 294* (1921).

Every facet of the organization and operation of baseball is covered. The Constitutions of the various leagues, the National Agreement, the Agreement with Western Union Telegraph Company, Uniform Players Contracts, Reserve Clauses and correspondence constitute a portion of the numerous exhibits. Testimony of experts and owners as to the manner of operation, as to the reserve clause, its origin, reason, operation and effect, as to the control and black-listing of players, as to the waiver system and as to practically every detail in the conduct of the business of baseball are to be found in the transcript.

The Supreme Court of the District of Columbia ruled as a matter of law that the pattern presented was a violation of the antitrust laws. The Court charged the jury:

> "This declaration, very long as I say, may be divided into two parts. In the first part the plaintiffs have charged the existence and operation of what has been called 'organized ball', and I shall adopt that phrase because it is perfectly understood by us all now after the evidence has gone in. That part of the declaration charges the maintenance of this system and its operation and there seemed to be no dispute among the witnesses, no substantial dispute, no conflict in the evidence, as to what the arrangement, or system is and has been, and how it has operated, under the control of the defendants.
>
> So that the question of law arose whether that did constitute an attempt to monopolize the business in question, and as an inseparable part thereof, to monopolize a part of interstate commerce. I felt obliged to hold as matter of law that it did." (*Vol. 64 Transcript*

of Records, U. S. Supreme Court No. 204 (1921) p. 495).

It is apparent what the Court had before it has been synthesized in the expression "organized baseball". The Court was considering a pattern and not an abstract idea designated "baseball."

The same basic framework and modus operandi was considered by the Court of Appeals for the District of Columbia when baseball appealed from the adverse decision of the lower court. The Court of Appeals reversed the decision (269 F. 681) in which opinion there appears, on page 687:

> "Generally speaking, every player was required to contract with his club that he would serve it for one year, and would enter into a new contract 'for the succeeding season at a salary to be determined by the parties to such contract'. The quoted part is spoken of as the 'reserve clause', and it is found, in effect, in the contracts of the minor league players as well as in those of the major league players. For his services each player was given a certain consideration, and for consenting to the reserve clause another consideration, both of which were set forth in his contract. It is provided in the rules adopted by the leagues and in the National Agreement that, if a player violates the reserve clause, is guilty of 'contract-jumping', he shall be punished by being treated as ineligible to serve in any club of the leagues until he has been formally reinstated, and a list of such ineligible players is kept by the leagues."

> "The number of players which each club was permitted to employ was limited to 22. It is admitted that this was a reasonable number, and that none of the clubs retained more players than it needed. The number of skilled players available did not equal the demand, and clubs within the appellant leagues were competing among themselves for first-class players. One of the directors of the appellee admitted that, if his club had to compete for public favor with the appellants, it undoubtedly would have been driven to the

ranks of the latter for many of its players. If the reserve clause did not exist, the highly skilled players would be absorbed by the more wealthy clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them. By means of the reserve clause and provisions in the rules and regulations, said one witness, the clubs in the National and American Leagues are more evenly balanced, the contests between them are made attractive to the patrons of the game, and the success of the clubs more certain. The reserve clause and the publication of the ineligible lists, together with other restrictive provisions, had the effect of deterring players from violating their contracts, and hence the Federal League and its constituent clubs, of which the appellee was one, were unable to obtain players who had contracts with the appellants; in other words, these things had the intended effect, viz. of preventing players from disregarding their obligations. On these provisions, all having for their purpose the preservation by each club of its necessary quota, and no more, of players, rests the gravamen of appellee's case. It must be obvious that the restrictions thus imposed relate directly to the conservation of the personnel of the clubs, and did not directly affect the movement of the appellee in interstate commerce. Whatever effect, if any, they had, was incidental, and therefore did not offend against the statute."

The language above quoted from the decision of the Court of Appeals of the District of Columbia was before the Supreme Court when writ of error issued to the lower Court. In the opinion of Mr. Justice Holmes is found *inter alia:*

> "The decision of the court of appeals went to the root of the case, and, if correct, makes it unnecessary to consider other serious difficulties in the way of plaintiff's recovery." (*Federal Baseball*, 259 U.S. 200)

It appears clear that Mr. Justice Holmes regarded the business of giving exhibitions of baseball as "purely state

affairs" and also decided that such exhibitions "would not be called trade or commerce in the commonly accepted use of those words." But it is equally clear that the whole pattern of organized baseball was patent to the Supreme Court when the *Federal Baseball* case was decided. The decision is not a summary dismissal of the subject.

The *Federal Baseball* case has been cited and applied on numerous occasions by the United States Supreme Court, by United States Courts of Appeals, by United States Districts Courts and by the Courts of the several states. Its precise import may not always have been weighed. The case was given a very broad interpretation and was regarded by many courts as a refuge for not only baseball in all of its aspects, but for all types of sporting enterprises and in all of their aspects. Most courts seemed to consider that Congress had acquiesced in a blanket exclusion for baseball if not for all sports. It would appear that it was not until the decision was questioned in the *Gardella* v. *Chandler*, 172 F. 2d 402, that analysis was undertaken to determine the precise points for which *Federal Baseball* was authority. In *Toolson* we were told that *Federal Baseball* "determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws". In *United States* v. *Shubert*, 348 U.S. 222, we are advised that the baseball cases may be read as "specifically fixing the status of the baseball business under the antitrust laws *and more particularly the validity of the so-called 'reserve clause.'*"

The United States District Court for the Eastern District of Pennsylvania in *U. S.* v. *National Football League*, 116 F. Supp. 319, refers to *Federal Baseball, Toolson, Kowalski* and *Corbett*, as the "baseball 'reserve clause' cases" and observes: "The only restriction alleged in the baseball cases was in the internal operation of professional baseball itself."

Congress likewise has given consideration to the extent of baseball's present position and in considering bills

which would afford an exemption to all professional sports in all of their aspects, rejected the suggested legislation upon the objection that the exemption embraced all other activities "as well as the aspects of baseball which are solely related to the promotion of competition on the playing field". *(H.R. Rep. 2002, 82nd Cong. 2nd Sess. p. 230).* Pregnant in such language and the report in general is the inference that Congress does approve the exclusion from the antitrust laws of the aspects which are solely related to the promotion of competition on the playing field. Properly construed *Federal Baseball* plus *Toolson* does constitute an approval of these aspects of the sport. And so refined, these decisions no longer should cause the hysteria which public officials have exhibited. The sweeping "exemption" of all sports in all of their aspects would be avoided. The approved pattern of player distribution and regulation found in baseball and followed in football would be the only aspects outside of the scope of antitrust regulations.

The conformity of the organizational and operational patterns of baseball and football are most convincingly established by the mere reading of the record in *Federal Baseball,* the complaints in *Toolson, Corbett* and *Kowalski* and comparison with the complaint of Radovich here before us. There is not one relevant fact *alleged* in the Radovich complaint which does not stand as *proved* in the *Federal Baseball* record. The organization of the sport into leagues of competing teams, the agreement to employ a uniform players' contract, the insertion in said contract of a reserve clause wedding the player to the team with which he was signed, the agreement to suspend and black-list players who violate the reserve clause are in common the pattern of each sport and are the aspects of each which have elicited the complaints which brought on judicial scrutiny.

The *Toolson, Corbett* and *Kowalski* cases confirm the identical features of the two sports. Although these cases

came to the higher Courts after dismissals below and consequently have not the voluminous record of testimony found in *Federal Baseball*, each offers a complaint setting forth the very charges which are here under consideration with respect to football. The complaints in *Toolson, Corbett* and *Kowalski* are interchangeable with that of Radovich.

We set forth for comparative analyses the charging paragraphs of the *Toolson* and Radovich complaints:

Toolson.	Radovich.
"XI	"13
"That the defendants and each of them, have entered into or agreed to be bound by a contract in the restraint of Interstate Commerce; that said contract is designated as the Major-Minor League Agreement, dated December 6, 1946, and provides in effect that:	"The said unlawful conspiracy to monopolize, monopoly and attempt to monopolize, the contracts, combinations and conspiracies to restrain trade and commerce in the business of organized professional football have consisted and do consist of a continuing agreement and concert of action among the defendants, the substantial terms of which agreement and the means of such concert of action are as follows:
1. All players' contracts in the Major Leagues shall be of one form and that all players' contracts in the Minor Leagues shall be of one form.	(a) That defendants agree that in making contracts with football players, each will use the uniform players' contract published by the National League
2. That all players' contracts in any league must provide that the Club or any assignee thereof shall have the option to renew the players' contract each year and that the player shall not play for any other club but the club with which he has a contract or the assignee thereof.	(b) That defendants agree to insert in said uniform players' contract a reserve clause under the terms of which the football player binds himself not to sign a contract with or play for any club other than the club which originally employed him or its assignee. In effect this clause prevents a player from ever playing for any team other than
3. That each club shall, on or before a certain date each year, designate a reserve list of active and eligible players which it desires to reserve for the ensuing year. That no player on such a reserve list may thereafter be eligible to play for any other	

Toolson.

club until his contract has been assigned or until he has been released.

4. That the player shall be bound by any assignment of his contract by the club, and that his remuneration shall be the same as that usually paid by the assignee club to other players of like ability.

5. That there shall be no negotiations between a player and any other club from the one to which he is under contract or reservation respecting employment either present or prospective unless the Club with which the player is connected shall have in writing expressly authorized such negotiations prior to their commencement.

6. That in the case of Major League players, the Commissioner of Baseball and in the case of Minor League players, the President of the National Association, may determine that the best interests of the game require a player to be declared ineligible and, after such declaration, no club shall be permitted to employ him unless he shall have been reinstated from the ineligible list.

Radovich.

his original employer unless the employer consents.

(c) That defendants agree that any player violating the reserve clause will be black-listed by all clubs in the National League so that no club in the said National League may hire him." (R. 9-10)

It is inconceivable that a decision upon the basis of the facts set forth in the *Toolson* complaint would be inapplicable to the facts alleged in the Radovich complaint. The only distinguishing feature is that one sport is called "baseball" and the other "football".

It is no cause for wonder that the Court below in the matter pending before us, after a full comparative analysis concluded, with reference to football:

"Its operation has just about the same aspects as baseball" (R. 75). The Court observed: "Football is a team sport". The brief of petitioner would lead one to believe that this was the only common note and that the decision of the Court of Appeals is an "exemption" for all "team sports". The argument is specious. It is true that baseball and football are each competitive team sports dependent for popular patronage upon a well rounded schedule of contests among teams of comparable strength. But the likeness does not end there. The Court found the sports to possess the "same *aspects*".

Baseball and football are each organized upon a league basis in order to provide a balanced program of events.

Major league baseball consists of the National League and the American League, each comprised of eight teams, which maintain intraleague schedules during a regular season. The championship teams of both leagues meet in the World Series to determine the world championship. Football is similarly organized into leagues. Major calibre football is embraced within the framework of the National Football League and its constituent Western Conference and Eastern Conference, each comprised of six teams. A regular season intra-conference schedule determines divisional champions who meet in a World's Championship game.

Each sport is presided over by a commissioner who is delegated regulatory and disciplinary power.

Each sport is subject to governing agreements providing organization and regulating operation. In baseball these provisions are found in the organic rules of the National League of Professional Baseball Clubs and the American League of Professional Baseball Clubs and in the Major-Minor League agreement. The rules governing professional football are found in the constitution and by-laws of the National Football League, an unincorporated association.

The governing canons of each sport prescribe generally and in common:

(a) That a uniform player's contract shall be employed by all teams.

(b) That such contract shall provide, for the benefit of the club, an option to renew the agreement respecting the services of a player.

(c) That a player may only perform for the team with whom he is under contract or to which such contract is assigned.

(d) Violation of a contract or of the clause which "reserves" the player to a team will result in the suspension of a player.

(e) Ineligible players may be reinstated only by ruling of the Commissioner.

It is these underlying agreements and particularly the "reserve clause" provisions thereof which have been the gravamen of all of the complaints filed against both baseball and football to challenge the status of such sports under the anti-trust statutes.

The petitioner has given full acknowledgment to the identical pattern of baseball and football by the very filing of a complaint modeled upon that found in the *Gardella* case and prompted by intimations there that the *Federal Baseball Case* was no longer the law. (Gardella decision Feb. 9, 1949. Radovich complaint filed July 5, 1949) A stipulation to defer the trial of the instant case until the Supreme Court had decided the *Toolson* case (R. 58) is further testimony of plaintiff's recognition of the parallelism existing between the sports.

Counsel for the Government in the brief for the United States filed with this Court in the *Boxing* case have also high-lighted the essential features of baseball to the degree that they are readily cognizable as the predominant char-

acteristics of the organization of professional football. In emphasizing the aspects of baseball which were not to be found in the boxing alignment the attorneys for the Antitrust Division have described the basic elements of football. Merely the name of the sport requires changing in the following argument:

> "Organized baseball is a tightly integrated organization of . . . clubs . . . which play many games each season. . . . But unlike most businesses, successful baseball operation requires that the competing teams cooperate with each other to insure that no one team attains too great superiority over its competitors . . . . For unless all teams in the league are of relatively equal playing ability, public interest soon wanes . . . Single exhibitions, however closely contested do not maintain public interest unless they are part of a larger drama—the quest for a championship . . . . The reserve clause, which has been described as 'the keystone of the entire structure of professional baseball' . . . is designed to achieve this equality among clubs for by tying players to particular teams it prevents the wealthier from buying up all the leading players. . . .
>
> "Thus unlike the reserve clause in baseball, there is no basis for assuming that the restraints which appellees have imposed on championship boxing can trace their genesis and growth to any decision of this Court. Furthermore in the Toolson case the complaint challenged the reserve clause, and if the challenge had been sustained, far-reaching changes in baseball's organization would have been required . . . "

The major portion of the language quoted from the Government's brief was culled from the report of the *House Committee on Monopolies* (*supra*). The portion quoted is to be compared with the following references made to professional football by the Court in *U. S.* v. *National Football League*, 116 F. Supp. 319:

> "Professional football is a unique type of business. Like other professional sports which are organized

on a league basis it has problems which no other business has. The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business.

"Professional teams in a league, however, must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably."

The comparable elements of baseball and football do not end with their present status but may likewise be projected into the future. In arguing the *Boxing* case the Government reasonably pointed out to the Court the absence of a circumstance which was of great weight in the *Toolson* case, namely, the chaos which would have resulted throughout baseball if the "reserve clause" had been invalidated:

"In baseball, if the challenge to the reserve clause in the Toolson case had been sustained, far-reaching organizational changes would have been required" (*Brief for United States*)

Doubtless such would have been the effect of a ruling adverse to baseball's reserve clause. But the results would not have been as "far-reaching" as those of a decision proscribing the "reserve clause" in the organization of professional football. It is to be remembered that base-

ball is all one family and it is not likely that the various teams would have undertaken an all-out raid upon the player talent of other clubs made "free agents" by the invalidation of the "reserve clause". The National Football League is not so situated. It controls a limited number of players only, and has been able to protect its interests from predatory rival leagues only through its "reserve clause". The in-roads which Canadian interests have been able to effect despite the "reserve clause" would indicate that the elimination of the clause would precipitate a full scale raid by the Canadian Football League upon the player talent developed by the National Football League over a period of years, at great expense.

(2) Radio—Television

Many of the antitrust attacks directed against the professional sports of baseball and football were undoubtedly prompted by statements in the opinions of Circuit Judges Hand and Frank in *Gardella* v. *Chandler*, 172 F. 2d 402, that developments in the transmission of narratives and pictures of baseball exhibitions had created a different set of facts than those which had confronted the Court in the *Federal Baseball* case. Obviously Radovich was aware of these opinions since he has attempted to qualify his claim for antitrust attention by alleging the impingement of professional football upon the radio-television field in the form of "lucrative contracts" (R. 7) granting rights to transmit reports of the games.

Interstate transmission of reports of sporting exhibitions is not a new feature. Judge Frank recognized that *Federal Baseball* involved the use of interstate telegraph to send "play by play" descriptions, but concluded that such phase had not been stressed in the earlier case (172 F. 2d, 402, 411). We can of course only speculate upon the influence of the telegraphic feature upon the thinking of the Court in the *Federal Baseball* case. We do know

however that it was before the trial court to the extent that the agreement between Western Union Telegraph Company and the National League of Professional Baseball Clubs was introduced as an exhibit by the plaintiff. (*Vol. 64 Transcript of Records, U. S. Sup. Ct. No. 204 (1921) p. 262*) and that the Court of Appeals of the District of Columbia noted "each league had a contract with a telegraph company for service". The then Supreme Court of the District of Columbia had theretofore held as a matter of law that "organized baseball" was in violation of the antitrust laws; and such summary treatment has deprived us of any finding which might have controlled the legal conclusion.

It is also clear that the relation of telegraph to baseball was urged as one of the interstate details in the presentation of *Federal Baseball* to the United States Supreme Court. At page 154 of the brief of the Plaintiff in Error is set forth:

> "We have not in the above discussion, made any reference to the various details of this business which reflect its inherently interstate character. It is common knowledge that baseball is the pre-eminent American sport. Millions of people follow the daily reports of the results of the games in the press, and in the large cities gather in the afternoons around the newspaper offices to see the bulletin reports of the scores. Not only so, but vast numbers of people travel from one city to another for the purpose of witnessing the games. Telegraph facilities are installed at all the ball parks in the Major Leagues, and in those of the more important Minor Leagues, where reports of the games are sent out and are received throughout the country. The Western Union Telegraph Company pays to the National League alone the sum of $18,000 annually for the exclusive privilege of having its wires on its grounds. Upon a scoreboard in each ball park the results of the games being played at the same time are indicated, so that the crowd assembled at each park is informed of the progress of the other games (Record, p. 262)."

We cannot agree with the interpretation placed upon this language by Judge Frank in the *Gardella* case, 172 F. 2d 402, 411, wherein he states that such language "merely called attention to the telegraph service as one of several factors tending to show the popularity and national character of 'organized baseball' ". It would rather appear that the reference to telegraph was made for the purpose which it purports to serve, namely, to show the "inherently interstate character" of Baseball.

Whatever the attempts to minimize its significance in the over-all decision it must be conceded that the element of interstate transmission of game reports was present in *Federal Baseball.* The fact that both football and baseball games are now carried by a different medium to the public cannot change those games from local affairs to inter-state affairs. That which is reported, the game itself, whether it be baseball or football are the same today as they were when radio and television were unknown to the public. It is conceded that broadcasting and telecasting across state lines constitute interstate commerce. However at the time of the *Federal Baseball* decision it had long been established that the telegraph was likewise an instrument of interstate commerce. See *Pensacola Telegraph Company* v. *Western Union Telegraph Company,* 96 U.S. 1, 24 L. Ed. 708; *Leloup* v. *Port of Mobile,* 127 U.S. 640, 8 S. Ct. 1380, 32 L. Ed. 311; *Western Union Telegraph Company* v. *Speight,* 254 U.S. 17, 41 S. Ct. 11, 65 L. Ed. 104. There can be no legal distinction between the transmission of the description of football or baseball games across state lines by radio or television and the transmission of such descriptions by telegraph and telephone. In the case of *Fisher's Blend Station, Inc.* v. *Tax Commission,* 297 U.S. 650, 56 S. Ct. 608, 80 L. Ed. 956 the Supreme Court of the United States in comparing communications by radio and by telegraph or telephone stated at page 654:

> " . . . In all essentials its procedure (radio broadcasting) does not differ from that employed in send-

ing telegraph or telephone messages across state lines, which is interstate commerce."

The fact that purchasers of rights from some clubs now also utilize radio and television as well as telegraphy for transmitting descriptions of football games does not distinguish the *Federal Baseball* case from the case at bar. Otherwise any local event which attracted the attention of the press or radio would become interstate. Numerous events which antedate radio and television have become popular subjects for broadcasting and telecasting. In a quick survey we can enumerate the Pasadena Tournament of Roses, New Orleans Mardi Gras, Philadelphia's Mummers Parade, Saint Louis' Veiled Prophets Pageant, Cheyenne's Rodeo and New York's Saint Patrick's Day Parade. Can it be argued that any of these events have been transformed into interstate activities by their adoption as objects for broadcasting or telecasting? They as well as professional football and baseball games would be carried on tomorrow exactly as they are today if for some cause radio or television ceased to exist. The essential and controlling difference, from the standpoint of interstate activity or commerce, between the reporting of a local event and the local event itself must not be overlooked.

The point which we are endeavoring to make is clearly stated by the New York State Labor Relations Board in *In re Herbert Bayard Swope*, 24 L.R.R.M. 1065. In that proceeding, the jurisdiction of the State Board over a dispute between employees and employers engaged in racing, was challenged on the ground that although racing had once been a local sporting event, interstate radio and television had changed it into an interstate one; hence, the State Board was without jurisdiction, the labor dispute being one within the jursdiction of the National Labor Relations Board. In answer, the New York State Labor Relations Board said:

"Present day radio broadcasting and television are something more than telegraphy, and we recognize that differences in degree may be tantamount to differences in kind. Both media, it is said, 'bring the event into the home', but that is more figurative than accurate. Although broadcasting and televising give a more dramatic portrayal than does telegraphy, the event itself does not thereby take place interstate. The race is still at its physical situs, even though electrical impulses convey sound and images to other points. We are not dealing here with regulation of such impulses. * * * Thus, whatever the difference between telegraphy on the one hand, and broadcasting and televising on the other, none of these form any part of Respondents' activities or alter the essential local character of the activity in which Respondents actually are engaged; namely, racing." (l.c. 1066)

Again, *In the Matter of Olympia Stadium Corporation,* 85 N.L.R.B. 389, the National Labor Relations Board refused to assume jurisdiction of a labor dispute between an employee and his employer, the Stadium Corporation, which was engaged in producing professional hockey matches which were both broadcast and televised, on the ground that notwithstanding the television and radio broadcast of such games they were local and not interstate events.

The fact that no allegation has been made that the respondents themselves are engaged in broadcasting or telecasting activities must also be kept in mind. Those who engage in transmitting the accounts of the games are engaged in interstate commerce. The defendants are not so engaged. The situation is similar to *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.*, 252 U.S. 436, 40 S. Ct. 385, 64 L. Ed. 649. There a suit brought by the advertising agency against the publishing company under the Sherman Act was dismissed, on the ground that the agency was not engaged in interstate commerce. Plaintiff there alleged that it was conducting an advertising agency

placing advertising in periodicals distributed by the publishing company and in other periodicals of other publishers, which were distributed throughout the United States; that the publications had enormous circulations (The Saturday Evening Post, The Ladies Home Journal, The Country Gentleman); that the publishing company dealt with the plaintiff and other advertising agencies throughout the United States; that the business of editing, publishing and distributing throughout the United States advertising matter contained in the publications, pursuant to contracts made with customers and advertising agencies, was in interstate commerce. Plaintiff alleged many other details of the publishing business and it is inconceivable that defendant publishing company was not engaged in interstate commerce. The question was, however, whether the "placing of advertising matter in publications of the defendant" was interstate commerce, or as was stated by the Court:

> " . . . the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant."

The Supreme Court said:

> "The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce."

Further the Court said:

> " . . . there is no ground for claiming that the transactions which are the basis of the present suit, concerning advertising in journals to be subsequently distributed in interstate commerce, are contracts which directly affect such commerce. Their incidental relation thereto cannot lay the groundwork for such contentions as are undertaken to be here maintained under Section 7 of the Sherman Anti-trust Act. The Court was right in dismissing the suit." (252 U.S. at 444)

It becomes abundantly clear that the respondents in the case at bar make a contract for the sale of radio and television rights. The defendants do not engage in the transmission of the accounts of games. Others do it. Blumenstock did not engage in the publication and distribution of magazines but only made contracts with others to do so.

In *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 151, 72 S. Ct. 181, 96 L. Ed. 162, the Supreme Court held a newspaper publisher to be engaged in interstate commerce and commented upon *Blumenstock* as follows:

> "The decision in Blumenstock Brothers Advertising Agency v. Curtis Publishing Co. related to the making of contracts for advertising rather than to the preparation and dissemination of advertising."

The *Blumenstock* decision stands squarely for the proposition that interstate activities of others, under contract with a principal party, do not place the principal party in interstate commerce.

Again, in *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F. (2d) 742 (C.C.A. 9th), cert. den. 299 U. S. 613, 81 L. Ed. 452, the Court held activities to be beyond the operation of the Sherman Anti-trust Act which involved securing of locations for billboards and posters throughout the several States, despite the fact that posters and lithographs were purchased and manufactured in one state and transported into another for display purposes, "the display being essentially local in character after all transportation, local or interstate, had ceased". 85 F. (2d) 750.

So in the case at bar, the display of the television image, or of the aural account of the game, at the place where seen or heard, is essentially local in character. The transportation in the case at bar is performed by others.

(3) Validity and Reasonableness of the Reserve Clause

In view of the fact that the "reserve clause" is the fulcrum upon which all of the controversy relative to these two sports is centered, specific comment upon this feature is indicated. The nature, history and purpose of the "reserve clause" were before the Courts in the *Baseball* cases, both old and new. Baseball had originally attempted to operate without a "reserve clause" and the attempt was disastrous (*H.R. Rep.* 2002, pp. 18-19). All of the outstanding talent became concentrated in one or two teams, resulting in unequal contests which discouraged patronage and caused financial loss. The Court of Appeals in the *Federal Baseball* case was thoroughly apprised of the situation when it stated:

> "If the reserve clause did not exist, the highly skilful players would be absorbed by the more wealthy clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them". (269 F. 681, 687).

In *United States* v. *Shubert*, 348 U.S. 222, this Honorable Court has stated that the baseball cases may be construed as "specifically fixing the status of the baseball business under the antitrust laws *and more particularly the validity of the so-called 'reserve clause'*" (emphasis ours).

The attorneys for the Government in the brief submitted to this Court in the *Boxing* case concede the validity of the "reserve clause":

> "The gravamen of the complaint in the Federal Baseball case was the alleged illegality of the so-called 'reserve clause' in the players' contracts, under which a player once he signs his first contract with organized baseball, is precluded from ever playing for another club unless he is sold or released (citing H. R. Report supra p. 114). The holding in Federal Baseball that baseball was not interstate commerce had the practical

effect of insulating the reserve clause from attack under the Sherman Act" . . .

"The reserve clause which has been described as the 'keystone of the entire structure of professional baseball' (Report p. 228) is designed to achieve this equality among clubs, for by tying players to particular teams it prevents the wealthier clubs from buying up all the leading players. (id. pp. 105, 208):"

The House of Representatives Committee heretofore referred to in its conclusions, stated:

"On the other hand the overwhelming preponderance of the evidence established baseball's need for some sort of reserve clause. Baseball's history shows that chaotic conditions prevailed when there was no reserve clause. Experience points to no feasible substitute to protect the integrity of the game or to guarantee a comparatively even competitive struggle. The evidence adduced at the hearings would clearly not justify the enactment of legislation flatly condemning the reserve clause" (*H.R. Rep. No. 2002, 82nd Congr. 2nd Sess. p. 229*)

Whatever may be the status of the other aspects of baseball with respect to antitrust laws it is clear that the control of player talent by means of the reserve clause is not in violation of the acts, either by virtue of congressional intent or by virtue of the reasonableness of the restraint exercised. It is inconceivable that the same reserve clause sanctioned in baseball should warrant condemnation when adopted by football. If, however, there is some distinction which precludes the application of the baseball cases to football's identic pattern may we point out that the court below has determined that the controls exercised by football, considered as and by itself, are "reasonable restraints":

"In professional football very good arguments do exist for the indulgence of restraints on individual players" (R. 76)

The position of the Court of Appeals is most sound. The same arguments advanced to uphold the baseball pattern apply with equal force to the football picture. It must be obvious to all, as it is to Congress, that the reserve clause is essential in order to maintain balance in the player personnel of the various teams and thus assure competition among teams of comparable strength. The clause is even more urgent in the conduct of football. Disparity in team strength is much more obvious in football than in baseball. Also baseball affords more opportunity for individual play than does football. In football the cohesiveness of the team is the principal factor for success. Such cohesiveness requires long periods of practice and play with the same roster of players. In baseball a pitcher may leave one club to join another and be available for play upon the day of his arrival. In football a quarterback transferring from one club to another may be valueless to the succeeding club for a whole season. The intricacy of play patterns and signals, the talents of his team-mates and the timing of play executions are not quickly learned.

The reserve clause in addition to providing team continuity and cohesion likewise contributes to the integrity of the sport. The device employed is but an option in the player's contract, granting to the club the right of renewal of the agreement for the services of the player. By such device is the public reassured that the player can be interested only in the success of the team to which he is under contract and to which it is likely his future playing days will be devoted. It is a means to prevent a "slow-down" effort by a player when competing against an opposing team with whom the player may desire future affiliation.

Just as football is able to offer arguments why the reserve clause is even more essential to its type of play than to that of baseball, so too is football able to point out that the pattern which it has adopted from baseball has not been extended to the points of aggravation which have invited criticism upon the sport of baseball. The record in *Federal Baseball* discloses that the cause for concern in

the baseball pattern was not the organization of a league of teams with internal control but organization of a greater magnitude than league scale. (*Brief of Plaintiff in Error p. 164-5*) Football operates no "farm systems" and attempts to control only those players under contract to its twelve clubs constituting but a single league, limiting each club to 33 players, exclusive of those on the injured or retired reserve lists. Most important the National Football League does not control or attempt to control the sources of player talent. Baseball maintains dominion over the player market down to the very sand-lots. A vast net-work of minor leagues embraces every player of even suspected talent. In football the National Football League obtains its players from the colleges, service teams and amateur groups, sources which are equally accessible to any other competitor, as is evidenced by the success of the Canadian football league in obtaining talent from the United States.

In this phase of the argument there is emphasized the fact that the Complaint fails to contain allegations from which it may be determined or inferred that a claim for relief is therein stated. Throughout the history of the enforcement of the Act, this Court has continuously confirmed the vagueness of the statutory language of Section 1 of the Sherman Act with the resultant duty upon the Court to interpret it, *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 474, 53 S. Ct. 471, 77 L. Ed. 825; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489, 60 S. Ct. 982, 84 L. Ed. 1311; *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 526, 68 S. Ct. 1107, 92 L. Ed. 1533, emphasizing the necessity for generality and adaptability such as is found in constitutional provisions. Hence, it is the courts, according to the rule enunciated in the cases just cited, which have been left to give content to the statute.

So, in *United States* v. *Associated Press*, 52 F. Supp. 362, aff'd, 326 U. S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013, District Judge Swan said at p. 370:

"Certainly such a function is ordinarily 'legislative'; for in a legislature the conflicting interests find their respective representation, or in any event can make their political power felt, as they cannot upon a court. The resulting compromises so arrived at are likely to achieve stability, and to be acquiesced in: which is justice. But it is a mistake to suppose that courts are never called upon to make similar choices: i.e., to appraise and balance the value of opposed interests and to enforce their preference. The law of torts is for the most part the result of exactly that process, and the law of torts has been judge-made, especially in this very branch. Besides, even though we had more scruples than we do, we have here a legislative warrant, because Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, *and by so doing has delegated to the courts the duty of fixing the standard for each case.* Congress might have proceeded otherwise; it might have turned the whole matter over to an administrative tribunal, as indeed to a limited extent it has done to the Federal Trade Commission. But, though it has acted, it has left these particular controversies to the courts, where they have been from very ancient times." (Emphasis supplied.)

In discharging that function of giving content to the statute, and interpreting its broad and general provisions, this Court has for nearly fifty (50) years held that an *unreasonable* restraint on the free flow of interstate commerce must be alleged and proved. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 60, 31 S. Ct. 502, 55 L. Ed. 619; *U. S.* v. *American Tobacco Co.*, 221 U. S. 106, 179, 180, 31 S. Ct. 632, 55 L. Ed. 663; *Times-Picayune Publishing Co., et al.* v. *U. S.*, 345 U. S. 594, 622, 97 L. Ed. 1277, 73 S. Ct. 872.

As has been shown, the professional football league and its member clubs are completely different from almost every other kind of enterprise. "The League is truly a unique business enterprise, which is entitled to protect its very existence by agreeing to reasonable restrictions on its member clubs." *U. S.* v. *National Football League, supra*, 116 F. Supp. 326. Hence, even though the Sherman

Act and amendments thereto are applied to the conduct of the game and to player regulations designed to promote competition, the "rule of reason" demands that the player contracts alleged to be in force be regarded as "reasonable," not in contravention of the act. For the Court so to hold is but to discharge the function of interpretation of the antitrust laws described above.

Indeed the Court need not go even that far to sustain the holding of the courts below that the Complaint fails to state a claim upon which relief can be granted. For plaintiff fails utterly to allege that the uniform player's contract is "unreasonable," or that the enforcement thereof against himself is "unreasonable."

That the uniform player's contract of the National Football League *is* reasonable, however, has inferentially already been held, for the property rights of the teams in their own players must exist for the reasons stated and to permit the conclusions referring to the players set out in *U. S.* v. *National Football League, supra,* 116 F. Supp. 323, 324:

> "It is particularly true in the National Football League that the teams should not compete too strongly with each other in a business way. The evidence shows that in the National Football League less than half the clubs over a period of years are likely to be financially successful. There are always teams in the League which are close to financial failure. Under these circumstances it is both wise and essential that rules be passed to help the weaker clubs in their competition with the stronger ones and to keep the League in fairly even balance.
>
> "The winning teams usually are the wealthier ones and unless restricted by artificial rules the rich get richer and the poor get poorer (as Commissioner Bell put it). Winning teams draw larger numbers of spectators to their games than do losing teams and from the larger gate receipts they make greater profits than do losing teams. With this greater wealth they can spend more money to obtain new players, they can pay higher salaries, and they can have better spirit among their players than can the weaker teams.

With these better and happier players they will continue to win most of their games while the weaker teams will continue to lose most of their games. The weaker teams share in the prosperity of the stronger teams to a certain extent, since as visiting teams they share in the gate receipts of the stronger teams. But in time even the most enthusiastic fans of strong home teams will cease to be attracted to home games with increasingly weaker visiting teams. Thus, the net effects of allowing unrestricted business competition among the clubs are likely to be, first, the creation of greater and greater inequalities in the strength of the teams; second, the weaker teams being driven out of business; and third, the destruction of the entire League.

"In order to try to keep its teams at approximately equal strength and to protect weaker teams from stronger teams, a league theoretically might use a number of devices. It might (1) limit the bonus price which could be paid to new players, (2) give the weaker teams a prior right over stronger teams to draft new players, (3) prohibit the sale of players after a certain day in the playing season, (4) limit the number of players on each team, (5) limit the total amount of salaries which a team can pay, (6) give the lowest team in the league the right to draft a player from the highest team, when and if the highest team has won a certain number (three for instance) of consecutive championships, and (7) reasonably restrict the projection of games by radio or television into the home territories of other teams."

Indeed, if the teams of the National Football League could not lawfully protect their property rights[1] in their players, by the use of their uniform contract, the League might well be utterly destroyed since nothing but chaos

[1] It is clear that each team has property rights in its players. Ever since *Lumley* v. *Wagner*, 1 DeG. M. & G. 603, and *Lumley* v. *Gye*, 2 Ellis & Bl. 216, property rights in unique personal services have been recognized. See, *House Committee Report, Organized Baseball, supra, p. 127, et seq.* The lack of reported decisions involving professional football players attests to the respect accorded the players' contract by the players themselves.

would result to the entire organization, built upon the sanctity of player contracts for thirty-five years.

(4) Boxing and Shubert Distinguished

The brief of petitioner is marked by a studied avoidance of any comparison between the sports of baseball and football or their constituent elements. From petitioner's brief one might obtain the impression that a lone *Boxing* case and one of the three opinions in the *Gardella* case were the only instances of judicial treatment in the field of sport. Fortunately the Court below was more comprehensive and made a full analysis of all of the cases in this field. The conclusion was that the *Boxing* case was not controlling since football and baseball were comparable and both differed from boxing.

In support of the position of the Court below we have hereinbefore stressed the similarity between football and baseball. May we now indicate the dissimilarity between football and boxing. The two are clearly distinguishable in organization and operation. That football and baseball are team sports unlike boxing is but an introduction to the variances. Boxing requires no league organization for the promotion of competition among teams and consequently requires no control of athletic talent to insure teams of competitive strength. Any individual promoter with requisite capital can stage a championship fight. There is absolutely no basis nor justification for a situation where all of the prime boxing talent should be under the domination of one promoter. Only public distrust can result from a series of matches and "return matches" among stable mates. No uniform players' contract enters into a consideration of boxing. The reserve clause which may well be called the "keystone of the entire structure" of professional football, as it has been described with reference to baseball, has no relation to the conduct of boxing. The sanctions which baseball and football find necessary to impose in order to enforce player control have no counterpart in boxing. The importance of radio and television in the staging of boxing events is a further differ-

entiating note. Many boxing shows are staged solely for the television audience; the sale at the boxoffice is nugatory. Proceeds from broadcasting and television are alleged to be in excess of 25% of the total revenue by the *Boxing* complaint. The record in *U. S.* v. *National Football League*, 116 F. Supp. 319, discloses that the revenue from the sale of both radio and television rights by the member teams of the National Football League for the five-year period 1947-1951 amounted to only 4.05% of total revenue. The sale and distribution of motion pictures of boxing contests to 18,000 theatres and the live and simultaneous telecasting of the events to audiences in 200 theatres throughout the country are further features associated with boxing and not found in the football format.

While considering statistically the relative position of radio and television in the staging of boxing and football exhibitions it might be well to inject parenthetically the allegation in the *Toolson* complaint respecting this element:

> "That the aforesaid production of games and narration by radio and transmittal by television to the outside public in the various states of the United States is a substantial part of the business of professional baseball in that the receipts from such activities exceeds $1,000,000.00 each year and exceeds the sum of 20% of the net profits of professional baseball each year." (Toolson complaint par. IX)

The complaint in the *Boxing* case presents an entirely different set of facts than that with which we are confronted. The Boxing combination did not attempt to stabilize a sport but to eliminate a competing promoter, to acquire exclusive right to promote professional boxing contests in all the principal arenas where championship matches could be successfully presented and to obtain the agreement of each title contender to take part only in title contests promoted by the defendants.

The difference between Boxing and Football are well set forth in the brief of the government filed in the *Boxing* case. The contrast made is between baseball and boxing

but the distinguishing features delineated are equally applicable in contrasting football and boxing.

Attorneys for the Government emphasize the importance of the "reserve clause" in the baseball structure and its absence in the boxing order. Considerable stress is directed to the fact that the organization of baseball was undertaken in reliance upon a ruling of the Courts that the "reserve clause" was a valid device, whereas:

> "Professional boxing, on the other hand, appears to have undergone little, if any, structural change since 1922, and it cannot point to any comparable organization which it has created in the past thirty years in reliance on exemption from the Sherman Act. Indeed, the restrictive practices upon which this suit is based were instituted only five and one-half years ago (pars. 17, 20-23, R. 5-7), and they involved only competitive practices, not the basic structure of the business." (*Brief for the United States*)

The same distinctions may be made between boxing and football in view of the basic "reserve clause" in the football structure and a reliance upon the validity of "reserve clauses" since 1921. In fact the hereinafter quoted paragraph from the brief of the government may, with but a change of name, stand as a pointed reference to football:

> "The economic characteristics of the two sports and the practical consequences of holding them subject to the Sherman Act, are markedly different. Organized baseball is a tightly integrated organization of several hundred clubs which play a great many games each season. But, unlike most businesses, the competing teams in a league must co-operate to insure that no team becomes much superior to its competitors, otherwise public interest will wane. Championship boxing is conducted on a match-to-match basis, bouts are held relatively infrequently, the business has developed no comparable organization, and there is no need to maintain similar equality of competitors. In baseball, if the challenge to the reserve clause in the Toolson case had been sustained, far-reaching organizational changes would have been required. Granting the relief sought by the Government in the instant case,

however, would not require substantial changes in the basic structure of championship boxing. Accordingly, there are no reasons, either legal or practical, which would justify application of the rule of stare decisis to preclude the Court from deciding now whether the boxing business, as conducted by appellees in the manner described in the complaint, is subject to the Sherman Act."

In summation, it is apparent that the *Boxing* case and the case at bar differ both factually and in the legal issues presented. Boxing could not claim to be identic in pattern with baseball and could show no reliance upon *Federal Baseball* in the development of its organization. It could not deny that it had become virtually a television production with but a studio audience in attendance. Boxing had come before the Court contending that all athletic exhibitions were free of antitrust restrictions. Football takes no such extreme position, realizing full well that all sports are subject to the impact of the laws, contending merely that an aspect of internal organization found unobjectionable in the baseball format is equally unobjectionable when presented in the pattern of professional football. In *Boxing* it was also conceded that if the antitrust laws were applicable, the complaint stated a cause of action. Respondents here insist the complaint of Radovich fails to state a claim regardless of the determination respecting the applicability of the Baseball cases.

There appears to be little basis for comparison between *United States* v. *Shubert*, 348 U.S. 222 and the case at bar. Only the frequent citation of the case by petitioner prompts a discussion of its inapplicability. There is no similarity of facts. Certainly the legal position there urged was extreme and untenable. The argument that *Federal Baseball* and *Toolson* were applicable to all personal exhibitions indicates a failure to appraise the baseball cases and to restrict them to their true import. That is believed to be the meaning of the decision of this Court in holding that if the *Toolson* decision were to be expanded

or contracted, Congress should do it. Football neither requires nor requests an expansion of *Toolson*. It merely urges that *Federal Baseball* be applied.

The plea for recognition of the doctrine of *stare decisis* by the theatre interests is likewise an ill-founded contention in the *Shubert* case. As the Opinion states:

> "The rule of stare decisis undoubtedly embodies a policy of basic importance but the rule cannot help the defendants here. If it is to be applied, Hart[2] and the Motion Picture cases—not Federal Baseball and Toolson—are the controlling decisions."

B. FAILURE TO STATE A CLAIM

(1) (a) Causal Connection

In a treble damage action under § 4 of the Clayton Act it is fundamental that a complaint must show, among other things that a violation of the antitrust statutes was the cause of damage to the plaintiff in his person or property. The statute is specific that the right of action exists for the benefit of a person "who shall be injured" . . . "*by reason of anything forbidden in the antitrust laws.*" (Clayton Act § 4)

That language is construed in *Hart* v. *B. F. Keith*, 12 F. (2d) 341, 345 as follows:

> "The plaintiff who seeks recovery must bear the burden of proof, not only that there was an attempt or actual monopolization or a combine or conspiracy in violation of the antitrust law, but it must be shown that there was injury to him as a *proximate result.*"

The requisites of a complaint predicated upon the right afforded in § 4 were prescribed by the court in *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F. (2d) 742, 754 (cert. den. 299 U.S. 613):

> "In the absence of an allegation of the *causal connection* between the damage, and the conspiracy to

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[2] *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U. S. 271.

restrict interstate commerce in posters no cause of action is stated under the Sherman Antitrust Act."

In *Beegle* v. *Thomson* (C.C.A. 7), 138 F. (2d) 875, the court, in holding that the district court had properly dismissed a count for treble damages, said:

> "Section 15, allowing private parties treble damages for injury accruing to their business from violation of the Anti-Trust Act, embraces, as one of the essentials to such action, injury to plaintiff's business. The complaint must affirmatively show this injury. It is not enough to allege something forbidden and claim damages resulting therefrom. Allegation of the specific injury suffered by plaintiff differing from that sustained by it as a member of the community is essential. The manner, nature, character and extent of the injury sustained and the facts from which injury accrues and upon which damages may be assessed as well as those with regard to the effect of the alleged violation upon plaintiff's business, must be pleaded. The mere existence of a violation is not sufficient ipso facto to support the action, for no party may properly seek to secure something from another without allegation and proof of facts demonstrating pecuniary loss springing from or consequent upon the unlawful act. (citing numerous cases) Inasmuch as the count embraced no such essential averments the court properly entered judgment dismissing it." (l.c. 881.)

In *Twin Ports Oil Co.* v. *Pure Oil Co.* (D.C. Minn.), 46 F. Supp. 149, the court said:

> "At the outset, it must be recognized that, in every violation of the Sherman Act, there is no legal or logical inference that someone has sustained recoverable damages in a civil action. A conspiracy under the Act may afford the Government the right to injunction or to the prosecution of criminal proceedings, but it does not necessarily follow that everyone who did business with the conspirators during the period were damaged, so as to enable them to recover in a civil proceeding." (l.c. 152.)

The complaint of Radovich relates a connection between football and "lucrative contracts for the interstate communication by radio and television of the playing of the games." (R. 7) It is this tenuous "connection" upon which petitioner relies for his claim that every aspect of Respondents' activities are interstate commerce. This is a complete disregard of the dog in appraisal of the function of the tail. It overlooks the fact that the tail is susceptible of amputation without impairment of the efficiency of the animal; that the sport operated profitably without radio and television and was practically compelled to grant broadcasting and telecasting rights by Government ukase.

The complaint in the case at bar however makes no contention that respondents themselves are engaged in the business of radio or television. It does not allege that anything done by these respondents has in any manner restrained or attempted to monopolize radio or television, or that anything done by respondents in these interstate aspects of their activities caused any damage to plaintiff. The words of Justice Minton in the *Boxing* case are not only apposite but even more appropriate by reason of the relative insignificance of radio and television in the football realm:

> "We are not dealing here with the question of whether the respondents have restrained trade in or monopolized the radio and television industries. That is a separate consideration. What others do with pictures they are allowed to take of a wholly local spectacle or exhibition by thereafter using the channels of interstate commerce to exhibit them does not make a package deal. The respondents have nothing to do with the transmission of sound or the pictures. Because these incidents are not directly involved, no effort was made to bring the radio and television companies and the sponsors into the case."

The same position was adopted by Judge Chase in his opinion in *Gardella* v. *Chandler*, 172 F. (2d) 402, 406:

> "Nor are there any allegations as to any monopoly to control, or any conspiracy to create one to control, the prices at which the rights to send descriptions of the games, visually or otherwise, are sold; and as much is true as to the advertising by the purchasers of those rights. Nor as to what effect, if any, such by-products of the games have upon the prices at which goods are sold in commerce or upon the purchasers and consumers of those goods. Nor that what is done in respect to broadcasting or telecasting the games has any causal connection with the damage the appellant alleges. See F. & K. Co. v. Special Site Sign Co., 9 Cir., 85 F. 2d 742, certiorari denied, 299 U.S. 613, 57 S. Ct. 315, 81 L. Ed. 452."

Obviously the crux of the Radovich complaint is the "reserve clause" feature of football's operation and nothing else. This is patent from a very clumsy attempt to tie the "reserve clause" into broadcasting and telecasting:

> "The contract hereinafter described between the football players and the defendants including the so-called 'reserve clause' relate not only to the local exhibition of football games but necessarily as well to the interstate broadcasting and televising thereof." (R. 8-9)

The allegation taken out of thin air for use as a binder is meaningless if not preposterous. From the balance of the complaint it is obvious that the "reserve clause" has absolutely no relation whatever to the fields of radio and television. The sale of rights to net-works or advertisers was in no manner affected by a provision in the players' contract that the club had the option to renew the services of the player.

The complaint fails to suggest, much less affirmatively show, that the player regulations had a substantial or any effect upon interstate trade or commerce. It is certain that they were not intended to affect interstate trade or

commerce. Their object was to insure the requisite amount of seasoned players for each club and evenly balanced teams in order to offer to the public the best competition possible. Conceding that the club owners contemplate the transportation of players across state lines, with their paraphernalia, it is obvious that the player regulations do not affect the number of players traveling in interstate commerce. They would be the same regardless of the effect of the player regulations upon individual players.

The allegations respecting the part played by radio and television in the makeup of professional football are wholly immaterial. As above indicated it is not claimed that respondents have attempted to monopolize these admittedly interstate factors. Even had there been such a contention the allegation would still be immaterial. Plaintiff is not engaged in broadcasting or televising. His claim rests solely upon his contention that the player regulations prevented him from obtaining employment as a professional football player. Any restraints upon the sale of broadcasting and telecasting rights, if they exist, plainly do not damage the plaintiff in his business or property; and he can not invoke a judicial determination with respect to the existence and validity of alleged restraints by which he is not proximately damaged.

In *Glenn Coal Co.* v. *Dickinson Fuel Co.* (C.C.A. 4) 72 F. 2nd 885, 887, the court said in part:

> "To recover, the plaintiff must establish two things: (1) A violation of the antitrust act and (2) *damages to the plaintiff proximately resulting from the acts of the defendant which constitute a violation of the act.*
>
> • • • •
>
> "A mere conspiracy with intent to violate the law while it may be the basis of a valid indictment under the criminal sanction of the Anti-Trust Act, does not give rise to a personal civil suit for damages."

Parts IV and V of the Complaint (R. 9-15) recite the "Combination and Conspiracy" and "The Boycotting and Blacklisting of Plaintiff". These portions of the complaint relate solely to player regulations and their imposition upon plaintiff by reason of his contract "jumping". From such recitals it is concluded:

> "31. By reason of the aforesaid violations of the anti-trust laws, defendants have injured the business of plaintiff by actively eliminating him from the business of organized football; they have suppressed competition and have monopolized the business of organized football; they have eliminated competition among themselves and prevented new competition; they have sought to impair the competition of the All America Conference; they have effectively placed all football players within their control in a condition of bondage through use of the uniform contract of the National League." (R. 16)

Plainly, the petitioner here has failed to allege in his complaint that he has suffered any damage from any act of the Respondents which impinges upon the field of interstate commerce. If plaintiff alleged damages, which he has not, those damages are attributable to the restraints created by player regulations.

The observations of the Supreme Court in *Board of Trade* v. *U. S.*, 246 U. S. 231, 238, are most pertinent. In that case the Board of Trade had a rule prohibiting any of its members between sessions from offering to buy grain other than at the closing price at the last session. The Government, claiming that this was an undue restraint upon interstate trade and commerce, brought suit to enjoin its enforcement. The Board of Trade in its answer alleged that the purpose of the rule was not to prevent competition or to control prices, but to promote the convenience of its members. On motion of the Government the averment was stricken from the answer and the relief prayed for by the Government granted. On direct appeal to the

Supreme Court, the judgment was reversed, the court saying:

> "No opinion was delivered by the district judge. The government proved the existence of the rule and described its application and the change in business practice involved. It made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of grain shipped to Chicago; or of retarding or accelerating shipment; or of raising or depressing prices; or of discriminating against any part of the public; or that it resulted in hardship to anyone. The case was rested upon the bald proposition that a rule or agreement by which men occupying positions of strength in any branch of trade fixed prices at which they would buy or sell during an important part of the business day is an illegal restraint of trade under the Antitrust Law. But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition."

The decision in *Hart* v. *Keith*, 12 F. 2d 341, affords us a further vantage point from which to view the complaint of Radovich. In that opinion at page 345, the court observes:

> "The plaintiff has testified as to the refusal of the the defendants to do business with him . . . He says much, by his own admissions, to justify the reason for refusing to do business with him."

Does not Radovich by his own allegations justify the refusal of respondents to admit him back into their organization? Admittedly he violated the obligation of his contract with Detroit and "jumped" to the Los Angeles

Dons upon the inducement of a higher salary. As the *Hart* case concludes:

> "The right of a person to do business with whomsoever he desires is well established (citing cases). There is no reason based on the common law or the Sherman Law, which requires the defendants to do business with plaintiff, if he is objectionable to them and that objection is based upon sufficient reason."

It is even questionable that the Radovich complaint alleges damage from any cause. The plaintiff states that by jumping from the Detroit Lions to the Los Angeles Dons he improved his financial position. His salary with Detroit was $3250 per year. The Los Angeles Dons paid him $6500 (R. 12). He has alleged an offer of employment from the San Francisco Clippers at $5000 per year and the retraction of the offer by reason of the blacklisting (R. 15). Damages prayed in the amount of $35,000 are based upon a claim that "defendants have injured the business of plaintiff by actively eliminating him from the business of organized football". (R. 16)

Other portions of the complaint inform us that the "black-listing" of the plaintiff involved only the members of the National League and what plaintiff has referred to as its "Pacific Coast Division" (R. 15). The existence of a rival All America Conference is alleged and the willingness of such league to pay plaintiff a greater recompense than the National League (R. 14). Yet plaintiff does not allege that he was prevented from obtaining employment as a football player with the All America Conference. Nor does he allege that he was thereby unable to obtain employment with teams engaged in playing in any other conferences. The complaint is eloquently silent on the matter of employment with the Canadian League. Certainly plaintiff, who did play football in the Canadian League during the period complained of, has not alleged that employment was unavailable in such league. Plain-

tiff further fails to allege that he did not obtain other employment, football, or otherwise, for a sum equal to, or in excess of the amount which he was foreclosed from earning by any alleged action of respondents.

Here it is pertinent to invite attention to the following authorities to the same effect as those already cited in this section of this brief, on the narrow point that assuming *arguendo*, violation of the antitrust laws is effectively alleged, plaintiff has failed to allege any damage or harm resulting to himself therefrom:

Revere Camera Co. v. *Eastman Kodak Co.*, 81 F. Supp. 325, 330 (N. D. Ill. E. D.);
Momand v. *Universal Film Exchange*, 172 F. 2d 37, 42, 43 (1st Cir.), *cert. denied*, 336 U. S. 967, *rehearing denied*, 337 U. S. 934 and 337 U. S. 961; also District Court opinion 72 F. Supp. 469, 478 (D. Mass.);
Turner Glass Corporation v. *Hartford-Empire Co.*, 173 F. 2d 49, 51, 52 (7th Cir.);
Twin Ports Oil Company v. *Pure Oil Company*, 119 F. 2d 747, 751 (8th Cir.), *cert. denied*, 314 U. S. 644, *rehearing denied*, 314 U. S. 711;
Jack v. *Armour & Co.*, 291 Fed. 741, 745 (8th Cir.);
Keogh v. *Chicago & N. W. Ry. Co.*, 271 Fed. 444, 447 (7th Cir.), aff'd, 260 U. S. 156;
Leonard v. *Socony-Vacuum Oil Company*, 42 F. Supp. 369, 370 (W. D. Wis.), App. Dis., 130 F. 2d 535 (7th Cir.).

The rule was the same at Common Law: *Scavenger Service Corporation* v. *Courtney*, 85 F. 2d 825, 832 (7th Cir.).

In *Keefe* v. *Derounain*, 6 F. R. D. 11 (N. D. Ill. E. D.), the Court said (p. 12):

> "• • • the gist of a civil conspiracy action is not the conspiracy itself, but the damage resulting to the plaintiff from acts done under the conspiracy."

Thus, in the absence of allegation of harm accruing to himself, a necessary averment, plaintiff's Complaint fails to state a claim for relief.

(1) (b) Members of League as Quasi-Partners

To refer to a conspiracy among the member teams of the National Football League is to disregard the nature of the enterprise. The members are not business competitors in the accepted sense. They are engaged in a joint venture in which the success of any is dependent upon the success of all. A weak member seriously affects all members. This unique aspect of league operations is the subject of comment in *U. S.* v. *National Football League, supra,* as hereinabove quoted. Under the quasi-partnership relationship so existing the members had the right to adopt regulations to control the internal operation of the league provided no public harm was caused by such regulations. Certainly the relationship of the various teams is much more of a reality than that of the members of the Chicago Board of Trade, whose internal regulation was found not to be objectionable in *Board of Trade* v. *U. S., supra.*

In the celebrated *U. S.* v. *Addyston Pipe and Steel Co.,* 85 Fed. 271, aff'd 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136, in upholding the principle that only unreasonable restraints of trade violate the Sherman Act, the Court cited illustrations of covenants in partial restraint of trade, generally upheld as valid (85 Fed. at 281), as follows:

> "... Covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business

retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the things sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employee of the confidential knowledge acquired in such business . . ."

The *Addyston* decision followed the development of the English law on restraint of trade (1 *Toulmin Anti-Trust Laws*, Vol. 1, p. 49, Section 2.15) and there has never been any deviation in the Federal Courts from the law there enunciated. *U. S.* v. *Bausch & Lomb*, 45 F. Supp. 387, 398, aff'd 321 U.S. 707, 64 S. Ct. 805, 88 L. Ed. 1024.

As has been shown, the members of the National Football League are in a sense partners, each club being interested in the success of its co-member, and each club being interested in the maintenance of organized and regulated play of the game, for the reasons heretofore stated. Thus, agreements between the club "partners pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm," is a traditionally recognized agreement at common law which violates no modern principle of Anti-Trust law protection.

The principle of quasi-partnership in modern business, although the relationship of the parties is not actually a partnership in the conventional sense, has been recognized in *U. S.* v. *Bausch & Lomb*, *supra*, 45 Supp. at p. 398, where the Court said:

"The arrangement, though not a partnership in legal form, is functionally a joint enterprise in which one will produce and the other market a commodity."

As a result of the application of the foregoing principle, it may be seen that an agreement to adopt and enforce the uniform player's contract, alleged by plaintiff to exist, contains no provisions more invidious than those characterized in the simple statement: *the adoption and enforcement of an agreement of partners not to re-engage an employee, who quit his job.* That simple statement, without more, should dispose of plaintiff's alleged claim of an Anti-Trust law violation.

Thus, *as a matter of law,* it appears that it would be unreasonable to hold that the professional football teams, comprising a league, could not lawfully protect their property in the services of players, *under contract,* by agreeing (a) not to invade each other's rosters and (b) not to develop playing skills or impart confidential systems of play for the use of disloyal players. This, not only for the necessity of the teams but for the guarantee to the public of maximum effort by the players in the contests. It would be "unreasonable" to proscribe the uniform contracts because it would be contrary to human experience.

International Boxing and *Shubert* present entirely different problems. There, the United States attacked an entire system. In the case at bar, only a narrow part of a system is attacked by a single player. As in *Toolson* and *Kowalski,* where this Court was not impelled to depart from the rule of *stare decisis,* so in the case at bar the Court may well held that there appears from the allegations of the Complaint no facts tending to establish that the adoption and enforcement of a uniform player's contract is "unreasonable," and no public interest or "public injury" is thus alleged or to be inferred. Moreover, in *Boxing* (348 U. S. 225, 226) and *Shubert* (348 U. S. 240) this Court said in identical language:

> "defendants do not deny that the allegations state a cause of action . . ."

In the case at bar, defendants *do* "deny that the allegations (of the Complaint) state a cause of action."

(2) The Complaint Fails to Allege Injury to the Public

The right of plaintiff to recover treble damages is incidental and subordinate to the protection of the public and it was created to induce private persons to aid in enforcement of the Anti-Trust laws. Hence, to state a claim for relief, a complaint must allege facts which would establish that the violations of the Sherman Act by which plaintiff allegedly has been damaged, are of such nature that the public itself has sustained a substantial injury. *Shotkin* v. *General Electric Co.* (10th Cir.), 171 F. 2d 236, 238-9; *Feddersen Motors* v. *Ward* (10th Cir.), 180 F. 2d 519, 521-2; *Citizens Pub. Co.* v. *Merchants & Manufacturers Assn.* (D.C. D. of C.), 83 F. Supp. 994, 997; *Riedley* v. *Hudson Car Co.* (D.C. Ky.), 82 F. Supp. 8, 10; *Glenn Coal Co.* v. *Dickinson Fuel Co.* (4th Cir.), 72 F. 2d 885; *Myers* v. *Shell Oil Co.* (D.C. Cal.), 96 F. Supp. 670, 674; *Arthur* v. *Kraft-Phenix Cheese Corp.* (D.C. Md.), 26 F. Supp. 824; *Abouaf* v. *Spreckles Co.*, 26 F. Supp. 830, 832-3.

In considering the allegations of the Complaint, it must also be borne in mind that plaintiff does not allege his ownership of a football team or a rival League or that he was in the business of engaging the services of other football players. Thus, the citations of the cases set out immediately above are apt. For example, in *Feddersen Motors, Inc.*, plaintiff failed to allege efforts of competitors to suppress competition or to create a monopoly in favor of the competitors. In *Citizens Pub. Co.*, plaintiff did not allege that defendants were engaged in a competitive business, that of publishing a newspaper. The Court said:

> "Obviously, the acts charged to defendants do not tend to create any monopoly of the newspaper publishing business on the part of the defendants. They are not engaged in that business."

It is certainly clear that for public injury to be inferred, there must be an allegation that competition exists between plaintiff and defendants, and the respondents in the case at bar are not in the business of "playing" football, any more than plaintiff is in the business of operating a football team or a rival league.

To give rise to an unreasonable restraint of trade, competitors of the alleged transgressor must exist in the area in which the restraint is exercised, or the alleged transgressor must adopt unreasonable means to prevent competitors from entering that area. *U. S.* v. *Inter-Island Steam Nav. Co.*, 87 F. Supp. 1010, 1020, 1021 (D. C. Hawaii).

In *Apex Hosiery* v. *Leader*, 310 U.S. 469, 500, 60 S. Ct. 982, 996, 84 L. Ed. 1311, 1327, this Court stated the policy of the Act as follows:

> "In the cases considered by this Court since the Standard Oil case in 1911 some form of restraint of commercial competition has been the sine qua non to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the *restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices.* Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, *unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.*" (citing cases.) (emphasis supplied).

Again, *Standard Oil Co.* v. *U. S.*, 221 U.S. 1, 58, 31 S. Ct. 502, 515, 55 L. Ed. 619, 644, the Court stated:

> "Without going into detail and but very briefly surveying the whole field, it may be with accuracy said

that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were *unreasonably restrictive of competitive conditions*, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that *they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices which were considered to be against public policy.*" (emphasis supplied)

In *Black & Yates* v. *Mahogany Ass'n.*, 34 F. Supp. 450 (D. Del.) aff'd on this point 129 F. 2d 227, 231 and 232 (3d Cir.), the District Court in dismissing a claim based on the Sherman Act stated (34 F. Supp. 456):

"It is necessary to establish by facts well pleaded not only that a combination exists but that it has a 'necessary tendency to cause direct and undue restraint of competition in commerce' . . . Here there was no agreement affecting production, fixing prices or trade maintenance. Members of the association are free to sell as they choose. The anti-trust acts have a single purpose: *To prevent any combination of persons from monopolizing commerce in a particular commodity and destroying competition in trade to the injury of the public*". (emphasis supplied)

In *Neumann* v. *Bastian-Blessing Co.*, 70 F. Supp. 447 (N.D. Ill. E.D.), the Court stated, p. 448:

"Section 1 of the Sherman Act prohibits a monopoly as a result of conspiracy or combination causing a substantial dominance or exclusion of competitors, and

Section 2 prohibits monopolizing, i.e., the acquisition of power to fix prices, limit production or deteriorate quality. The allegations of amended paragraph 7, 39, and 40 indicate reliance by plaintiff upon a violation of Section 1 of the Act, with the exception of the general charge in paragraph 65 stating that because of such domination 'defendant has been able to and has increased the price of its said products in such foreign trade.' This latter is a mere legal conclusion of the pleader and no facts appear in any count to support it. It is necessary for plaintiff to allege with a degree of certainty and definiteness the conspiracy or combination *to restrict free competition in the sale and distribution of gas regulating equipment in order to state a cause of action.*" (emphasis supplied)

In *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 825, 826 (D. Md.), dismissing a complaint, the Court said, in justifying defendant's refusal to sell:

> ". . . it does not justify a suit . . . unless the effect of the refusal was to substantially lessen competition . . ."

Plaintiff alleges only that by virtue of the adoption and enforcement of a uniform player's contract, and because of his own breach of it, he could not obtain engagement in the National Football League, or its "Division." Those allegations, if proved, would fail to establish a substantial injury or indeed any injury to the public. Nothing is alleged from which it can be inferred that restrictions upon the employment of Radovich decreased the quantity or quality of professional football games or caused any increase in prices to be charged to the public for admissions to games.

(3) The Clayton and Norris-LaGuardia Acts Specifically Exempt From the Antitrust Laws, Plaintiff's Claim for Relief Set Out in the Complaint

Plaintiff claims that defendants by agreement contained in the uniform player's contract have refused to employ him in their professional football league. A refusal by

employers, whether singly or in concert, to employ any party to a labor dispute is declared by the Clayton and the Norris-LaGuardia Acts (29 U.S.C. § 52; 29 U.S.C. §§ 101-15) not to be considered or held to be in violation of any law of the United States. Hence, the complaint is fatally defective.

The allegations of the complaint reveal nothing more than a controversy between the employee and his employer and their association concerning terms and conditions of employment. Radovich alleges that he was under contract to the Detroit Lions; that he committed a breach of his contract; that he was placed on the ineligible list, and that by agreement the ten member football clubs of the National League refused to allow him to play in the National League, or its "Division".

The primary object of Congress, both in the Clayton Act and the Norris-LaGuardia Act, was of course to benefit labor; to make is entirely clear that direct strikes and secondary boycotts would not subject labor to civil or criminal prosecution under the Sherman Act.

While this undoubtedly was the primary object of Congress, both the wording of the Acts and their legislative history show that there is no doubt that so far as the definition of a labor dispute is concerned the provisions of both Acts were intended to apply equally to employers as well as employees.

Section 20 of the Clayton Act (29 U.S.C. § 52) provides in part as follows:

> "And no such restraining order or injunction shall prohibit any person or persons, *whether singly or in concert* . . . from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; . . . *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*" (emphasis supplied)

Section 1 of the Clayton Act (29 U.S.C. § 53) provides:

> "The word 'person' or 'persons' wherever used in section 52 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Plainly, plaintiff's attempted statement of a claim for relief, falls within the precise terms of the statute quoted above.

Aside from this specific exemption granted by Section 20 of the Clayton Act to the exact conduct charged to the defendants in this case, Section 6 of the Clayton Act and the Norris-LaGuardia Act also exempt from the Sherman Act this dispute arising out of the employer-employee relationship.

It is declared, in Section 6 of the Clayton Act:

> "The labor of a human being is not a commodity or article of commerce . . .". (15 U.S.C. § 17)

That this section exempts restraints regarding employee services from the operation of the Sherman Act has been expressly held by this Court in the *Apex Hosiery* case, wherein the Court said:

> "A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a 'restraint of trade.' Since the enactment of the declaration of §6 of the Clayton Act, 15 U.S.C. §17, that '*the labor of a human being is not a commodity or article of commerce* . . . nor shall such [labor] organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the Anti-Trust laws,' it would seem plain *that restraints on the sale of the*

> *employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.''* (emphasis supplied)
>
> *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 502-503

That this principle laid down in the *Apex Hosiery* case is equally applicable to agreements of employers and employers' associations and to disputes between employers and an employee is clear from the language both of Section 20 of the Clayton Act and the history and provisions of the Norris-LaGuardia Act.

In the report to the Senate of the Norris-LaGuardia Act, it was said:

> ''Moreover, it will be observed that this section (Section (6), as do most of all of the other prohibitive sections of the bill, *applies both to organizations of labor and organizations of capital.* The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees.'' (emphasis supplied) (*Sen. Rep. No. 163, 72nd Cong., 1st Sess. 19*) (*1932*)

Subsections (a) and (c) of Section 13 of the Norris-LaGuardia Act (29 U.S.C. § 113, (a) and (c)) read as follows:

> ''(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employers; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) *between one or more employers or associations of employers and one or more employees or associations of employees;* (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between

one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested therein (as defined in this section).

* * * * *

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*" (emphasis supplied.)

This Court has held that the Sherman Act, Section 20 of the Clayton Act and the Norris-LaGuardia Act are three interlacing statutes which are to be read together. *United States* v. *Hutcheson*, 312 U.S. 219.

When the statutes are so read, it is clear that the Complaint alleges at most only a labor dispute within the definition of Section 13 of the Norris-LaGuardia Act and Section 20 of the Clayton Act and that accordingly the claim for relief attempted to be stated, is exempt from the Anti-trust Laws by the specific provisions of Section 20 of the Clayton Act.

CONCLUSION

Respondents have herein contended that:

1) The pattern of the organization and operation of professional football is identical with that of organized baseball and is not violative of the antitrust laws under the authority of the *Baseball* cases.

2) The radio-television aspects involved in the presentation of professional football do not constitute a basis for distinguishing the case at bar from the *Baseball* cases.

3) The "reserve clause" employed by professional football in and of itself is reasonable and not in contravention of the antitrust laws.

4) The cases of *International Boxing Club* and *Shubert* are clearly distinguishable and constitute no basis for a determination of the pending matter.

5) The complaint of petitioner is defective in failing to allege a causal connection between anything forbidden by the antitrust laws and the alleged injury of petitioner, if indeed any injury at all has been alleged.

6) The complaint fails to allege that anything done by respondents tended to restrict competitive conditions or cause the injury to the public which the anti-trust laws were intended to prevent.

7) The complaint alleges a labor dispute which is specifically exempted from the antitrust statutes by provisions of the Clayton and Norris-LaGuardia Acts.

Respondents respectfully urge that the decision of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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APPENDIX

CLAYTON ACT:

Section 1.

"The word 'person' or 'persons' wherever used in section 52 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

29 U. S. C. § 53.

Section 6.

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

15 U. S. C. § 17.

Section 20.

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irrepar-

able injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

29 U. S. C. § 52.

NORRIS-LAGUARDIA ACT:

Section 13.

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade,

craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section)."

* * * * * * * *

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

29 U. S. C. § 113(a)(c).

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. 94

WILLIAM RADOVICH,

Petitioner,

vs.

NATIONAL FOOTBALL LEAGUE, BERT BELL, J. RUFUS KLAWANS, BOSTON YANKS, NEW YORK RANGERS, NEW YORK GIANTS CLUB, PHILADELPHIA EAGLES, THE LOS ANGELES RAMS FOOTBALL CLUB, INC., PITTSBURGH STEELERS FOOTBALL CLUB, WASHINGTON REDSKINS, CHICAGO BEARS FOOTBALL CLUB, INC., CHICAGO CARDINALS FOOTBALL CLUB, DETROIT LIONS FOOTBALL CLUB, GREEN BAY PACKERS, SAN FRANCISCO CLIPPERS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS J. RUFUS KLAWANS AND PACIFIC COAST FOOTBALL LEAGUE.

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In the Supreme Court
OF THE
United States

October Term, 1956

No. 94

William Radovich,

Petitioner,

vs.

National Football League, Bert Bell, J. Rufus Klawans, Boston Yanks, New York Rangers, New York Giants Club, Philadelphia Eagles, The Los Angeles Rams Football Club, Inc., Pittsburgh Steelers Football Club, Washington Redskins, Chicago Bears Football Club, Inc., Chicago Cardinals Football Club, Detroit Lions Football Club, Green Bay Packers, San Francisco Clippers, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS J. RUFUS KLAWANS AND PACIFIC COAST FOOTBALL LEAGUE.

PRELIMINARY STATEMENT.

The action was commenced by William Radovich in the District Court of the United States for the Northern District of California, Southern Division, claiming treble damages under the provisions of the Sherman Act. Motion to dismiss the complaint was made upon the grounds:

1. That the complaint indicates a lack of jurisdiction in the Court over the subject matter.

2. That the complaint fails to state a claim upon which relief can be granted.

The said District Court made an order granting the motion to dismiss; judgment was entered thereon.

Upon appeal to the U. S. Court of Appeal, Ninth Circuit, judgment of the District Court was affirmed.

This Court granted petition for certiorari on October 8, 1956.

The conspiracy charged in petitioner's complaint involved the National Football League and some of its member teams, as well as these respondents, the Pacific Coast Football League and J. Rufus Klawans.

The basic issues involved in this writ are substantially the same as to all respondents. A brief has already been filed by respondents National Football League, Chicago Cardinals Football Club, Inc., New York Football Giants Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club.

In the interest of brevity, these respondents hereby adopt the legal arguments contained in the brief of

the foregoing respondents, rather than again setting them forth in this brief.

However, as the respondent J. Rufus Klawans was the Commissioner of the Pacific Coast Football League and never associated in any way with the respondent National Football League, nor with any of its member teams, these respondents submit the following legal arguments in addition to those adopted from the briefs of the other respondents.

SUMMARY OF PETITIONER'S CONTENTIONS.

Petitioner contends, in substance, that respondents are engaged in Interstate Commerce; that respondents have been refused an exemption from anti-trust liability from Congress; that during the period alleged in petitioner's complaint the respondents engaged in conduct forbidden by the anti-trust laws duly passed by Congress; that petitioner has a direct and primary right of action for injury suffered by him as a result of the forbidden conduct on the part of respondents.

Hence, petitioner argues that his complaint states a cause of action.

Upon analyzing the above the following questions become immediately apparent:

1. Were respondents engaged in Interstate Commerce?

2. Were respondents refused an exemption from anti-trust liability?

3. Did respondents engage in conduct forbidden by the anti-trust laws duly passed by Congress?

4. Did any acts of respondents prejudice the public interest by unduly restricting the free flow of interstate commerce? and

5. Assuming that any acts of respondents did so prejudice the public interest was there any injury to petitioner as a proximate result?

These respondents will discuss the above questions in the order listed.

THESE RESPONDENTS WERE NOT ENGAGED IN INTERSTATE COMMERCE

As above stated, petitioner argues that the playing of professional football is interstate commerce, that as a consequence petitioner was engaged in an interstate occupation; that any activities of respondents which harmed petitioner in the matter of his employment constituted a violation of the Sherman Act.

The flaws in the process by which petitioner arrives at such an obvious *non sequitur* are discernible upon cursory examination.

Firstly, petitioner assumes that the playing of professional football is "commerce" as the term is used in the Sherman Act.

Secondly, that the pattern followed by the respondents in the operation of the respective leagues rendered this "commerce"—*interstate* commerce.

The composition and *modus operandi* of professional football is identical with that of "organized baseball".

The Court below, in the instant case, concluded:

> "Its operation has just about the same aspects as baseball."

In *Federal Baseball Club v. National League*, 259 U.S. 200, this Court considered the composition of organized baseball and held that the playing of games in various cities, even though in different states, was purely local and "intrastate" rather than "interstate" in character.

Petitioner in drawing his complaint, sought to come within some of the language contained in one of the opinions in the case of *Gardella v. Chandler*, 172 Federal (2d) 402.

The language, behind which petitioner seeks refuge, states that the local and intrastate character of organized baseball may be changed upon a proper showing than the playing of a baseball game, or the results thereof, were transmitted across state lines by radio or other means.

However, the record in the instant case, shows that at all the times mentioned in petitioner's complaint, none of the respondents engaged in any such activity, and any broadcasting of games, or results, was of a purely incidental and sporadic nature, and neither substantial, organized nor profitable.

Accordingly, petitioner's attempt to convert respondents' activities from that which the *Federal*

Baseball case, supra, held to be a purely local and intrastate business to that which he terms an "interstate" activity, is a clear case of the tail wagging the dog.

RESPONDENTS DO NOT CLAIM THAT PROFESSIONAL FOOTBALL IS EXEMPT FROM ANTI-TRUST LAWS.

These respondents do not contend that professional football or professional baseball or any other sport possesses an exemption from the operation of the Sherman and Clayton Acts.

These respondents do claim however, that the acts complained of in petitioner's complaint are not forbidden by the operation of the Sherman and Clayton Acts.

As stated in *Hunt v. Crumboch,* 143 F. (2d) 902 (3d Circuit):

> "Congress did not undertake by the enactment of the Sherman and Clayton Acts, to prohibit each and every restraint."

Respondents contend that Congress did not intend to include within the scope of anti-trust laws, certain aspects of "organized baseball"; these aspects have been referred to as "the constituents of baseball".

See:

Federal Baseball v. National League, 259 U.S. 200;

U. S. v. Int. Boxing Club of New York, 348 U.S. 236.

For the reasons heretofore and hereafter stated, respondents contend that these same aspects are found in professional football, and by a parity of reason, are *"the constituents of football"* and therefore are not included within the scope of the anti-trust laws.

RESPONDENTS DID NOT ENGAGE IN CONDUCT FORBIDDEN BY THE ANTI-TRUST LAWS.

Petitioner constantly refers to the conduct of respondents in highly dramatic words such as "boycott", "ban" and the "ruination of competitive leagues".

Unfortunately for petitioner, his colorful characterizations cannot change the facts as to what respondents actually did, to-wit, the operation and enforcement of a perfectly valid reserve clause.

The whole framework of organized baseball was considered in the *Federal Baseball* case, supra, including the nature, operation, effect and necessity for a "reserve clause".

Generally speaking a "reserve clause" requires every player to contract with his club to serve it for one year and to thereafter enter into a new contract for the succeeding season at a salary to be determined.

If a player violates the "reserve clause" he is guilty of "contract jumping" and is punished by being treated as ineligible to serve in any club of the leagues until he has been formally reinstated. The leagues keep a list of such ineligible players.

The nature, history and purpose of uniform contracts and reserve clauses in the field of professional sports have been thoroughly considered by the courts and have been found to be not in violation of the anti-trust laws.

The decision of the Court of Appeals in the *Federal Baseball* case, found at 269 Federal 681 at 687, omitted no detail in its consideration of the nature, operation and necessity for a "reserve clause".

Petitioners complaint does not allege a single act upon respondents' part that was not found as a proven fact in the record of the *Federal Baseball* case.

The Court below concluded that the operation of professional football "has just about the same aspects as baseball," and that:

> **"Within the four corners of the complaint, we doubt that the alleged means, restraint by the reserve clause and its enforcement is legally sufficient to support, without more, a conclusion that these means were calculated to prejudice the public or unreasonably restrain interstate commerce."**

NO ACTS OF RESPONDENTS PREJUDICED THE PUBLIC INTEREST BY UNDULY RESTRICTING THE FREE FLOW OF INTERSTATE COMMERCE.

The sole charge laid to respondents by petitioner's complaint is that the former enforced a "reserve clause" in a uniform player's contract.

Petitioner argues that this conduct is in violation of the anti-trust laws because it unduly restricted the

free flow of interstate commerce. Petitioner supports the charge by the further claim that respondents sought by unlawful combination, to control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States.

All respondents can possibly be charged with is treating petitioner as a "contract jumper", which he admittedly was.

In the *Federal Baseball* case, supra, the Court said:

> "The reserve clause and the publication of the ineligible lists, together with other restrictive provisions, had the effect of deterring players from violating their contracts . . . in other words these things had the intended effect, viz. of preventing players from disregarding their obligations."

Apparently the Court saw a public benefit flowing from the restraints rather than a public injury.

Petitioner assumes that respondents' treatment of him as a "contract-jumper" is a matter of public concern. Such is not the fact.

The cases which hold that public injury flows from a restraint upon interstate commerce concern themselves with a public injury of a type that affects prices, diminishes the free flow of goods or brings about a deterioration in the goods or services furnished to the public.

The elimination of petitioner from the line-up of a team in either league would be of little public concern,

and definitely of no public injury, if there were others to replace him.

See:

Hunt v. Crumboch, 143 Fed. (2d) 902.

The Circuit Court, in the instant case, concluded, expressly, that the conduct charged to respondents in petitioner's complaint did not prejudice the public or unreasonably restrain interstate commerce.

Respondents respectfully submit that this conclusion is amply supported by the record, and the legal authorities cited in the Court below, and the respective briefs filed by respondents in this Court.

PETITIONER'S COMPLAINT DOES NOT SHOW AN INJURY TO HIM AS A PROXIMATE RESULT OF ANY BREACH OF THE ANTI-TRUST LAWS BY RESPONDENTS.

Respondents have shown that the conduct charged to them in petitioner's complaint was not in violation of the anti-trust laws.

Further, and of even greater importance, is the obvious defect in petitioner's argument, to-wit, that there is no causal connection between any injury to the petitioner, and any alleged act of respondents which constituted a violation of the anti-trust laws.

The complaint fails to allege facts which show, or even suggest, that the uniform player's contract or reserve clause had a substantial or any effect upon interstate trade or commerce. This is an essential element of his cause of action. Its absence is fatal to his pleading.

As petitioner was not injured by reason of any act of respondents which was forbidden or declared to be unlawful by the anti-trust laws, or which unduly restricted the free flow of interstate commerce, his complaint does not state a cause of action, and was properly dismissed.

The applicable principle of law is stated thusly in *Conference of Studio Unions v. Loew's, Inc.*, 193 F. (2d) 51:

> ". . . in order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws.
>
> Such a construction is in accordance with the basic and underlying purposes of the anti-trust laws to preserve competition and to protect the consumer. *Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm.*"

CONCLUSION.

Summarizing the foregoing, these respondents contend that petitioner's complaint does not show that respondents were engaged in interstate commerce; that

even if it be assumed that it does, that the only acts complained of are matters pertaining to the operation, effect and enforcement of a "reserve clause"; that such a clause has been held to be lawful in organized baseball and not in violation of the anti-trust laws; that the aspects of the reserve clause held valid in organized baseball are equally applicable to organized football; and, finally, that petitioner has not shown that he suffered any injury or damage which proximately resulted from the doing of acts by respondents which were forbidden by the anti-trust laws.

Accordingly, the respondents respectfully urge that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed and this writ discharged.

Dated, San Francisco, California,
December 26, 1956.

LEO R. FRIEDMAN,
Attorney for said Respondents.

J. BRUCE FRATIS,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 94

WILLIAM RADOVICH, PETITIONER

v.

NATIONAL FOOTBALL LEAGUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The complaint in this case charged that respondents have been monopolizing, and conspiring and attempting to monopolize, commerce among the States in the business of professional football, and conspiring thereby to restrain such commerce, in violation of Sections 1 and 2 of the Sherman Act (R. 9). It was further alleged that the various team members of respondent National Football League play one another in metropolitan centers throughout the United States; that before the opening of the season they make contracts for the interstate broadcasting and televising of these games; and that such contracts "are part of the business of professional football itself", and without the monies derived therefrom the

business would not be profitable (R. 7–8). Respondents' violation of the statute injured petitioner, it was alleged, by excluding him from the business of organized professional football (R. 10–16). The relief sought was treble damages and an injunction against further violation (R. 16–17).

Following the decision in *Toolson* v. *New York Yankees*, 346 U. S. 356, the District Court (N. D. Cal.) dismissed the complaint on the ground that it failed to state a cause of action (R. 62–64). The Court of Appeals, regarding the case as governed by *Toolson* and the *Federal Baseball Club* case (259 U. S. 200), rather than *United States* v. *International Boxing Club*, 348 U. S. 236, affirmed the judgment of dismissal (Pet. iii–v). It held that football, being a "team sport," was more like the business of baseball than the business of boxing. The court also held that the complaint did not state a claim because the facts alleged did not show that respondents' conduct "was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce" (*id.*, v).

The Government believes that the decision below is in conflict with this Court's decision in *International Boxing*, and that the petition presents a question of public importance which this Court should resolve, namely, whether all businesses involving team contests are beyond the purview of the Sherman Act.

In *United States* v. *Shubert*, 348 U. S. 222, 230, this Court said that "*Toolson* was a narrow application of the rule of *stare decisis*." The Court explained that in *Toolson* it had been confronted with "a unique

combination of circumstances", in that the decision in *Federal Baseball* had specifically fixed the status of the baseball business under the antitrust laws, that during a period of over 30 years the baseball business had grown and developed in reliance on this decision, and that Congress, although actively considering the decision, had not seen fit to enact amendatory legislation. *Id.* at 229. Accordingly, in the *Shubert* and *International Boxing* cases the Court held that *stare decisis*, as applied in *Toolson*, did not go beyond the business of organized baseball and did not embrace either "all businesses built around the live presentation of local exhibitions", as contended by the *Shubert* defendants, or all "exhibitions of an athletic nature", as contended by the *International Boxing* defendants. See 348 U. S. at 242.

We submit that the court below plainly erred in holding that all "team sports" are within the *stare decisis* rule as applied in *Toolson*. The holding in *International Boxing* that the business of promoting championship boxing contests is not governed by *Federal Baseball* and *Toolson* was not based on any differentiation between a business involving contests between teams and a business involving contests between individuals. Moreover, Mr. Justice Frankfurter's dissent viewed the decision in *International Boxing* as granting to baseball an exemption from the Sherman Act denied to "every other sport" (348 U. S. at 250), "whether boxing or football or tennis" (*id.* at 248).

In *International Boxing* the Court held that, if it were not for *Federal Baseball* and *Toolson*, it would

be "too clear for dispute" that the allegations of the complaint brought the defendants within the scope of the Sherman Act. 348 U. S. at 240–241. The allegations viewed as having this effect were that the defendants' business involved promoting "contests on a multistate basis, coupled with the sale of rights to televise, broadcast, and film the contests for interstate transmission." *Id.* at 240. Since the complaint in the instant case makes like allegations (*supra*, p. 1), it is clear that, apart from *Federal Baseball* and *Toolson*, respondents' business also comes under the Act.

The second ground for affirmance given by the court below appears to be a holding that the complaint was insufficient because it did not show that the statutory violations which it sets forth prejudice the public. But the complaint specifically alleged that respondents have been monopolizing, and attempting and conspiring to monopolize, an interstate business. "Whether these charges be called 'allegations of fact' or 'mere conclusions of the pleader' ", they include "every essential to show a violation of the Sherman Act", and, on motion to dismiss, are sufficient. *United States* v. *Employing Plasterers Assn*, 347 U. S. 186, 188–189. The holding by the court below that petitioner was required to show not only that respondents had engaged in conduct which Congress has declared to be illegal, but also that their conduct was to the prejudice of the public, writes into the statute a limitation on its prohibitions not warranted by its language or by the decisions of this Court. The Sherman Act, the Court said in an early

case, "is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results." *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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JULY 1956.

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No. 94

In the Supreme Court of the United States

OCTOBER TERM, 1956

WILLIAM RADOVICH, PETITIONER

v.

NATIONAL FOOTBALL LEAGUE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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Section 5	12
Section 16	1, 11

409444—56——1

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 94

WILLIAM RADOVICH, PETITIONER

v.

NATIONAL FOOTBALL LEAGUE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE

STATEMENT

Petitioner filed this suit in 1949 under Sections 4 and 16 of the Clayton Act, 15 U. S. C. 15, 26, seeking recovery of treble the damages he had sustained by reason of respondents' violation of the antitrust laws and injunctive relief against further violation. The defendants, respondents here, were the National Football League (National League), its then ten member clubs, and two individuals. Since the district court dismissed the complaint for failure to state a cause of action and the court below affirmed, the allegations of the complaint must be taken as true. The allegations pertinent to the issues before this Court are summarized below.

Continuously since about 1938 the defendants have been conspiring to monopolize, attempting to monopolize, and monopolizing commerce among the states in the business of professional football, and have been conspiring to "control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States", in violation of Sections 1 and 2 of the Sherman Act (R. 9). This monopoly and conspiracy has consisted in part of agreements to boycott and, if possible, ruin the All America Conference, organized as a rival to the National League, so that the business of organized football would remain a monopoly of the National League (R. 14).

The teams of the various National League members play each other in various metropolitan centers, including New York, Chicago, Philadelphia, and Los Angeles (R. 7). Prior to the opening of each season the defendants make contracts by which they sell for large sums of money the right to broadcast and televise their games across state lines (R. 8). Without the money so received "the business of operating a professional football club would not be profitable", and the broadcasting and televising contracts are "part of the business of professional football itself" (*ibid.*).

By agreement, each National League member uses the uniform player contract published by the National League. This contract contains a reserve clause by which the player binds himself not to play for any other club without its consent (R. 10). The defendants further agree that no member club will hire a player who has violated the reserve clause (*ibid.*).

Petitioner began his professional football career in 1938. He played for the Detroit Lions, a National League club, for the 1938, 1939, 1940, and 1941 seasons and, following three years' service in the Navy, for the 1945 season (R. 10–11). After the Detroit Lions had refused petitioner's request that he be traded to a National League club located at Los Angeles, he played during the 1946 and 1947 seasons for a Los Angeles team of the All America Conference (R. 12–14). An affiliated member of the National League wished to employ petitioner for the 1948 season, but failed to do so when the National League advised it that petitioner was blacklisted and that, if he were hired, severe penalties would be imposed against the club (R. 14–15). This blacklist, ban, and boycott remained in effect up to the time of the filing of the complaint (R. 15).

The defendants, by reason of their violations of the antitrust laws "have injured the business of plaintiff by actively eliminating him from the business of organized football", and the amount of this injury is $35,000 (R. 16).

The district court granted the defendants' motion to dismiss the complaint following the decision in *Toolson* v. *New York Yankees,* 346 U. S. 356 (R. 62–64). The court of appeals affirmed the dismissal upon the ground that the case was governed by *Toolson* and its parent, *Federal Baseball Club* v. *National League,* 259 U. S. 200, rather than by *United States* v. *International Boxing Club,* 348 U. S. 236. The court reasoned that football, being a "team sport," was more like baseball than boxing (R. 75–

76). The court also held that the complaint did not state a cause of action because it did not allege facts from which it could be determined as a matter of law that the defendants' conduct "was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce" (R. 76–77).

THE GOVERNMENT'S INTEREST IN THE QUESTIONS PRESENTED

This Court's determination of the question whether the Sherman Act applies to a business involving promotion of team contests will settle this issue as to both Government and private suits brought under the Act, and is of obvious concern to the United States. The Government also has an interest in the question whether a private litigant, asserting injury caused by violation of the antitrust laws, is required to show also that the violation was calculated to prejudice the public interest. The ruling below is general in its application and, if upheld, will militate against the effectiveness of private triple damage and injunctive suits based on violation of the antitrust laws. Such suits were authorized by Congress as a means of deterring illegal restraints and monopolizations of trade, and they are an important supplemental aid to direct enforcement proceedings by the Government in bringing about obedience to the commands of the statute.

ARGUMENT

I

THE COURT BELOW ERRED IN INTERPRETING *FEDERAL BASEBALL CLUB* V. *NATIONAL LEAGUE*, 259 U. S. 200, AND *TOOLSON* V. *NEW YORK YANKEES*, 346 U. S. 356, AS REQUIRING THE HOLDING THAT THE BUSINESS OF PROFESSIONAL FOOTBALL, NO MATTER HOW INTERSTATE ITS CHARACTER, IS NOT SUBJECT TO THE SHERMAN ACT

The Government submits that the court below erred in dismissing the complaint upon the authority of the *Federal Baseball* and *Toolson* decisions. In 1922 this Court held in *Federal Baseball* that the business of baseball, as it was then conducted and as described in the record in that case, was not subject to the Sherman Act. The Court reasoned that the business consisted of giving a series of local exhibitions, that this activity is not interstate "trade or commerce" within the meaning of the Sherman Act, and that the transportation of persons across State lines was "a mere incident" to these local exhibitions. 259 U. S. 200, 208–209.

The scope and effect of this decision were considered by the Court in 1953 in *Toolson*. The holding was that, without re-examination of "the underlying issues", the Court would adhere to the *Federal Baseball* case "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws" (346 U. S. at 357). The reasons stated for applying the rule

of *stare decisis* were that the business of organized professional baseball had been left to develop for 30 years on the understanding that it was not subject to existing antitrust legislation, and that Congress had had the *Federal Baseball* ruling under consideration but had not seen fit to enact legislation to subject this business to the antitrust laws.

Two decisions by this Court at the following term clarified the *Toolson* ruling. *United States* v. *Shubert*, 348 U. S. 222, held that the business of providing theatrical exhibitions on a multistate basis constitutes interstate "trade or commerce" within the scope of the Sherman Act. The Court held that "*Toolson* was a narrow application of the rule of *stare decisis*" based upon "a unique combination of circumstances," and refused to "convert this narrow application of the rule into a sweeping grant of immunity to every business based on the live presentation of local exhibitions, regardless of how extensive its interstate phases may be." 348 U. S. 229–230.

United States v. *International Boxing Club*, 348 U. S. 236, held that the business of promoting professional championship boxing contests is within the reach of the Sherman Act. The Court declared that the case presented none of the factors underlying the *Toolson* decision. No court had ever held that the boxing business is not subject to the antitrust laws, and *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U. S. 271, had "clearly established that *Federal Baseball* could not be relied upon as a basis of exemption for other segments of the entertainment business, athletic or otherwise." The *International Boxing* de-

fendants therefore could not bring themselves under the wings of *stare decisis*.

The same considerations apply to the business of football. None of the unique *stare decisis* considerations found applicable to baseball in *Toolson* exists as to football. Like the boxing business, a holding that the business of football is exempt from the statute would be, not to continue an exemption previously judicially determined, but to create a new exemption. If those engaged in football or other professional sports enterprises wish relief of this kind, they must, the Court has said, resort to Congress, which has considered but not enacted bills providing for such relief. See 348 U. S. 242–244.

Notwithstanding that the *Toolson* ruling is plainly confined to that with which it alone dealt, the baseball business, the court below concluded in the instant case that the football business is within the ambit of *Toolson* because football, like baseball, is a team sport. Neither the language nor the reasoning of the *International Boxing* opinion warrants this conclusion. Although the case held that the boxing business is subject to the Act although baseball (by virtue of *stare decisis*) is not, the Court did not differentiate the two upon the ground that one business involved promoting individual contests and the other team contests. Indeed, Mr. Justice Frankfurter in his dissent in *International Boxing* asserted that, with respect to the criteria relevant to the applicability of the Sherman Act, there is not "a single differentiating factor between other sporting exhibitions, whether boxing or *football* or tennis, and baseball" (348 U. S. 248, emphasis added).

The present respondents in their brief opposing certiorari urged that, because the reserve clause of their player contracts is similar to the reserve clause of the baseball clubs' player contracts, the business of professional football is sufficiently like that of professional baseball to bring them under the *Federal Baseball* and *Toolson* decisions. But a necessary premise of this contention is that in *Federal Baseball* this Court based its decision, at least in part, on the nature of the reserve clause of the player contracts. We submit that this is not the case. The allegations and evidence of conspiracy to monopolize the baseball business were held not to show a violation of the Sherman Act upon the ground that the nature of the business was such that it did not come within the Act's scope. Accordingly, the Court did not reach or consider the legality of the means used in effectuating the alleged conspiracy. Not only was the reserve clause not mentioned in the opinion, but the Court significantly said at the outset that, "in the view that we take", it was "unnecessary" to set forth the "means" by which the defendants carried out their conspiracy. 259 U. S. at 207.

In the *Federal Baseball* case the Court, on the basis of the record in that case, considered that the only interstate aspects of baseball were those relating to the travel of players across state lines. The Court held that this transport was "a mere incident, not the essential thing", and that the "essential thing" was the game or "exhibition", which "although made for money would not be called trade or commerce in the commonly accepted use of those words" (p. 209).

Thus, in its very terms, the *Federal Baseball* decision was limited to the factual situation of baseball as it was conducted at that time and as it was described in the record before the Court. A finding applicable to baseball in 1922, that the only interstate aspects shown were not enough to treat it as an interstate business, is not equivalent to a general ruling of law which is binding in later cases involving other sports or businesses where the factual showings as to interstate commerce are more substantial. As Mr. Justice Holmes, the author of the *Federal Baseball* opinion, stated at the next term in *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 271, 274 "it may be that what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently."

Hence, on a proper application of *stare decisis,* the *Federal Baseball* case would be relevant here if the facts in this case, as in *Federal Baseball,* were simply that the defendants' only function was to provide travel arrangements to players, and that this was the sole interstate aspect of their business. But, as already shown, the interstate allegations in this case, as in the *International Boxing* and *Toolson* cases, are far more extensive. The holding in 1922 in the *Federal Baseball* case that the interstate phases of baseball, as the Court then understood it to be from the record, were not enough to make it an interstate business does not, therefore, in any way compel or justify the conclusion in 1956 that the interstate phases of football, as alleged in the pleadings in this case, are not enough to make it an interstate business.

In short, the decision that the interstate features of baseball in 1922 were "a mere incident" of a local business is not a controlling precedent that the interstate features of football in 1956 do not bring it within the Sherman Act. Cf. opinion of Judge Learned Hand in *Gardella* v. *Chandler,* 172 F. 2d 402, 408 (C. A. 2).

Accordingly, the doctrine of *stare decisis* requires a comparison not between "boxing or football or tennis, and baseball insofar as the conduct of the sport" [1] is concerned (i. e., how the game is played), but rather between the degree of interstate business activity found in *Federal Baseball* and that involved in the particular case under review. Evaluation of the nature and extent of interstate business activity necessarily calls for a factual inquiry into the particular circumstances, not a mechanical application of a so-called rule of law. The author of the *Federal Baseball* opinion stated elsewhere that interstate commerce "is not a technical legal conception, but a practical one, drawn from the course of business". *Swift and Company* v. *United States,* 196 U. S. 375, 398. It is a misconception, therefore, to regard the *Federal Baseball* case as laying down a rigid rule of law, applicable in defining the scope of the Sherman Act, that where there is an interstate chain of plainly commercial activities, they lose their character as such merely because they culminate in an athletic contest, which as a sport resembles baseball. That erroneous conception of the *Federal Baseball* case has been definitely rejected by this Court. *United States* v. *International Boxing*

[1] Frankfurter J., dissenting in *United States* v. *International Boxing Club,* 348 U. S. 236, 248.

Club, 348 U. S. 236, 241–243; *United States* v. *Shubert*, 348 U. S. 222, 230.

II

THE COURT BELOW ERRED IN HOLDING THE COMPLAINT DEFICIENT FOR FAILURE TO ALLEGE FACTS SHOWING THAT DEFENDANTS' CONDUCT WAS CALCULATED TO PREJUDICE THE PUBLIC INTEREST

The complaint is grounded on Sections 4 and 16 of the Clayton Act. Section 4, 15 U. S. C. 15, provides that any person "who shall be *injured* in his business or property *by reason of anything forbidden in the antitrust laws* may sue therefor * * *, and shall recover threefold the damages by him sustained * * *" [emphasis added]. Section 16, 15 U. S. C. 26, provides in part that any person shall be entitled to injunctive relief "against threatened loss or damage by a violation of the antitrust laws". Thus all that need be shown is violation of the antitrust laws and injury caused thereby (or in a suit for an injunction, threat of such injury). We submit that the court below clearly erred in reading into the statutory authorization the further requirement that the plaintiff in such a suit allege and prove that the violation charged against the defendant was "calculated to prejudice the public".

In determining whether particular conduct does or does not violate the antitrust laws, the effect of the conduct on trade and commerce may be a pertinent consideration. But this does not mean that in a suit based on violation of these laws, there is, in addition to the question of violation, a separate and independent issue as to injury to the public resulting from

the violation. Congress, when it outlawed certain conduct, made its own determination that the outlawed conduct was against the public interest. This Court has declared that the Sherman Act was enacted in order to suppress practices which had "become a matter of public concern" and "had come to be regarded as a special form of public injury". *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 493. The Act, the Court has said, "is its own measure of right and wrong" and "the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results." *Standard Sanitary Manufacturing Co.* v. *United States,* 226 U. S. 20, 49.

The holding below that the petitioner had to show, in addition to violation of the antitrust laws, injurious effect on the general public, is to construe the laws as meaning that conduct which Congress has outlawed may nevertheless be condoned upon the basis of some vague "public interest" concept. No court has suggested that the statute permits any such defense when the Government, which is charged with the duty of enforcing these laws, is bringing civil or criminal proceedings against alleged violators. No reason has been advanced why the rule should be different in a suit by a private party for triple damages or for an injunction, as expressly authorized by statute. On the contrary, Congress when it provided in Section 5 of the Clayton Act, 15 U. S. C. 16, that the final judgment against the defendant in any Government suit under the antitrust laws shall be prima facie evidence of certain matters in any suit by a private party

brought against the defendant under these laws, intended "to minimize the burdens of litigation for injured private suitors." *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 568.

It is true that among the hundreds of cases under the antitrust laws decided by lower Federal courts it has occasionally been stated that in a triple damage action the plaintiff must show that the defendant's acts not only violated the antitrust laws but also injured the "general public" or the "public interest." We believe that such statements represent no more than a rather infelicitous way of equating antitrust violation with injury to the public interest. In any event, rulings or dicta of this kind are found in only a tiny minority of the decisions, and there has been no rational articulation of the basis for requiring a showing of injury to the public.

The complaint in the present case clearly alleges both that respondents violated the antitrust laws and that the petitioner was thereby injured (*supra*, pp. 2, 3). A valid cause of action was thus stated (cf., *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186, 188–189), assuming, as we have previously contended, that the business of professional football enjoys no general exemption from the Sherman Act.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 94

WILLIAM RADOVICH, *Petitioner,*

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NATIONAL FOOTBALL LEAGUE, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

National Football League, Chicago Cardinals Football Club, Inc., New York Giants Football Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club

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---

PETITION FOR REHEARING

Respondents, National Football League, Chicago Cardinals Football Club, Inc., New York Giants Football Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club, petition this Honorable Court for a rehearing and specify the following:

GROUNDS

I

The opinion of this Court constitutes a discrimination against the sport of professional football and a preferential "exemption" of the sport of professional baseball.

The opinion of the Court holds that Congress, by failing to act after the *Federal Baseball* case, excluded baseball from the scope of the Sherman law but included football. The opinion further states that consideration of the basic differences, if any, between baseball and football is not necessary to the decision. In other words, the name of the sport is all-controlling. For purposes of this Petition, we think it only necessary to point out that the only basic difference in the record is that which this Court, as well as the American public, is fully informed upon, to-wit: the shape of the ball.

The American ideal of fair play historically has had its greatest expression on the athletic fields. It is for the Congress to legislate both the exceptions and the coverage of the Sherman law and it is respectfully submitted that this Court should not read into any act of Congress an unreasonable discrimination. We cannot believe that the size or shape of the ball or the historical accidents of previous litigation and congressional inaction justify any difference in the result of similar cases. We respectfully suggest that the opinion of this Court in the case of *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S. Ct. 693, is analogous and indeed controlling. In that case, the Court, speaking through Mr. Chief Justice Warren, stated, at page 694:

"The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

"Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."

This Court by judicial legislation has accomplished a result which Congress could not attain because of the due process clause of the Fifth Amendment. As Mr. Chief Justice Taft said in *Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, at page 129:

"Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which Legislatures, executives and courts are expected to make, execute and apply laws."

Had Congress committed such a discrimination, it undoubtedly would be held to be unjustifiable. Where as here it has occurred in this Court, it is only by the granting of this petition that the requirements of due process can be met. Certainly this Court would not impute to Congress an unconstitutional intent.

II

The opinion proscribes the principle of stare decisis and by restricting the effect of Federal Baseball to the business of baseball confounds the doctrine of stare decisis and res judicata.

III

Although the opinion proclaims that the rationale of Federal Baseball is to be found in a consideration of the degree of interstate activity involved, the Court refuses to apply the norm which it establishes.

In the opinion the Court concludes: "the volume of interstate business involved in organized football places it within the provisions of the Act". This conclusion can only be predicated upon the allegations of the complaint which relate to interstate business. We invite a comparison of these allegations with those of similar import which this Court considered in *Toolson* v. *New York Yankees*, 346 U.S. 356, a case which was likewise a review of a dismissal of a complaint. We submit that the allegations of the Toolson complaint are much more specific, definite and substantial upon the nature and extent of interstate activity involved. Yet the Court could not conclude that the volume of interstate activity involved in the business of baseball placed it within the orbit of the Act. The *Toolson* and *Radovich* decisions are irreconcilable.

IV

The argument and deliberation of this case was clouded by an extraneous issue which had no bearing upon the discussion.

The reply brief of Petitioner for the first time brought into contention a system of player selection commonly known as the "draft". The Court during

oral argument questioned the propriety of player selection. Considerable criticism in the public press has been directed at this device. However the "draft" is not an element for consideration in this case. There is no allegation in the complaint concerning the draft, nor that Radovich was drafted, nor that he was affected in any manner by the draft. The fact is that Radovich was never drafted.

V

The opinion expresses a desire to preserve the status quo and to place upon Congress the onus of providing remedial legislation if any be required. Yet the decision entered herein is contrary to that avowed intention and upsets rather than preserves existing conditions.

Assuming that the Court is correct in leaving to Congress the duty of undoing the effect of the *Federal Baseball* decision (if in fact any undoing is in order), then the Court should be consistent in standing by that decision and its reasonable import. Until Congress has acted, this Court should apply *Federal Baseball* as far as law and logic demand. Certainly law and logic require that *Federal Baseball* be followed in all identical factual situations. And the complaint before this Court in Radovich informs us that professional football commenced operations in the very year of the *Federal Baseball* decision and adopted the identical pattern employed by professional baseball.

Mr. Justice Harlan in his opinion in the case at bar suggests the course to be followed if logic and the *status quo* are to be considered. There it is stated that if the situation resulting from *Federal Baseball* is to be changed, it is far better for Congress to do so than for this Court to becloud the situation further

either by making untenable distinctions between baseball and other professional sports, or by discriminatory fiat in favor of baseball.

VI

The opinion although pointing out the injustices of retroactivity disregards the fact that the instant decision has a retroactive effect replete with injustices.

In *Toolson* this Honorable Court was careful to point out the serious and severe consequences to baseball which would have resulted from a disturbance of *Federal Baseball*. Yet Football, which has patterned itself upon the *Federal Baseball* decision since 1922 is not afforded like consideration for the consequences that obviously will flow from retroactive application of a new and discriminatory rule to its operations.

CONCLUSION

Wherefore respondents pray that for the reasons hereinabove stated this Honorable Court reconsider the opinion entered herein and grant a rehearing for that purpose.

Respectfully submitted,

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Certificate of Counsel

MARSHALL E. LEAHY does hereby certify that he is the attorney for the respondents in the above-entitled proceeding and that the foregoing petition for rehearing is presented in good faith and not for delay.

MARSHALL E. LEAHY